

11-5-2010

McCormack v. Caldwell Clerk's Record Dckt. 37494

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In the
SUPREME COURT
of the
STATE OF IDAHO

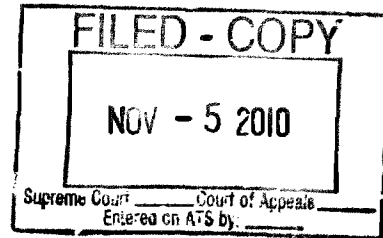
ROBERT J. McCORMACK,

PLAINTIFF-APPELLANT,

v.

CHRISTOPHER E. CALDWELL,
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

DEFENDANTS-RESPONDENTS.



CLERK'S RECORD ON APPEAL

Appealed from the District Court of the
Second Judicial District of the State of Idaho,
in and for the County of Nez Perce

The Honorable Carl B. Kerrick

Supreme Court No. 37494-2010

ATTORNEY FOR PLAINTIFF-APPELLANT
PRO-SE

ATTORNEY FOR DEFENDANTS-RESPONDENTS
RICHARD WHITEHEAD

37494

ROBERT J. McCORMACK,
Plaintiff-Appellant,

v.

CHRISTOPHER E. CALDWELL
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendants-Respondents.

SUPREME COURT NO. 37494-2010

Appeal from the District Court of the Second Judicial District
of the State of Idaho, in and for the County of Nez Perce

BEFORE THE HONORABLE CARL B. KERRICK, DISTRICT JUDGE

Counsel for Respondents
RICHARD WHITEHEAD

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,)	
)	
Plaintiff-Appellant,)	
)	
)	SUPREME COURT NO. 37494-2010
)	
v.)	TABLE OF CONTENTS
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CHRISTOPHER E. CALDWELL)	
WHITEHEAD, AMBERSON &)	
CALDWELL, PLLC,)	
)	
Defendants-Respondents.)	

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,)	
)	
Plaintiff-Appellant,)	
)	
)	SUPREME COURT NO. 37494-2010
)	
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Robert James McCormack vs. Whitehead Amberson & Caldwell PLLC, Christopher E Caldwell

Date	Code	User	Judge
6/8/2009	NCOC	TERESA	New Case Filed-Other Claims
		TERESA	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: Idaho Department of Corrections Receipt number: 0336597 Dated: 6/8/2009 Amount: \$88.00 (Check) For: McCormack, Robert James (plaintiff)
	COMP	TERESA	Complaint Filed
	FSUM	TERESA	Summons Filed
8/27/2009	SMRT	JENNY	Summons Returned - served 8/13/09
8/28/2009	MOTN	JENNY	Motion to Dismiss Pursuant to IRCP Rule 12(b)(6)
	MEMO	JENNY	Memorandum in Support of Motion to Dismiss Pursuant to IRCP Rule 12(b)(6)
	AFFD	JENNY	Affidavit of Christopher Caldwell in Support of Defendant's Motion to Dismiss Pursuant to IRCP Rule 12(b)(6)
	AFFD	JENNY	Affidavit of Ronda K. Nichols in Support of Defendant's Motion to Dismiss Pursuant to IRCP Rule 12(b)(6)
	ATTR	JENNY	Defendant: Whitehead Amberson & Caldwell PLLC Attorney Retained Richard G Whitehead
9/4/2009	ATTR	JENNY	Defendant: Caldwell, Christopher E Attorney Retained Richard G Whitehead
	NTHR	JENNY	Notice Of Hearing
	HRSC	JENNY	Hearing Scheduled (Motion to Dismiss 10/06/2009 09:00 AM)
10/5/2009	AFFD	JENNY	Affidavit of Robert J. McCormack in Support of Opposition to Defendants' Motion to Dismiss Pursuant to IRCP Rule 12(b)(6)
10/6/2009	ADVS	JENNY	Hearing result for Motion to Dismiss held on 10/06/2009 09:00 AM: Case Taken Under Advisement
	DCHH	JENNY	District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages
10/7/2009	MINE	JENNY	Minute Entry Hearing type: Motion to Dismiss Hearing date: 10/6/2009 Time: 9:07 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: JENNY Tape Number: CTRM #1 PLAINTIFF IS PRO SE RICHARD WHITEHEAD FOR DEFENDANT
11/6/2009	DEOP REGISTER OF ACTIONS	JENNY	Memorandum Opinion and Order on Defendants' Motion to Dismiss

A

Robert James McCormack vs. Whitehead Amberson & Caldwell PLLC, Christopher E Caldwell

Date	Code	User	Judge
11/6/2009	DSAT	JENNY	Dismissal During/after Trial Or Hearing
	CDIS	JENNY	Civil Disposition entered for: Caldwell, Christopher E, Defendant; Whitehead Amberson & Caldwell PLLC, Defendant; McCormack, Robert James, Plaintiff. Filing date: 11/6/2009
	STAT	JENNY	Case Status Changed: Closed
11/19/2009	MOTN	JENNY	Motion to Reconsider
	MOTN	JENNY	Motion and Affidavit in Support for Appointment of Counsel
11/23/2009	ORDR	JENNY	Order Denying Motion for Appointment of Counsel
11/25/2009	MEMO	JENNY	Memorandum in Opposition to Plaintiff's Motion to Reconsider
12/4/2009	AFFD	JENNY	Supplemental Affidavit of Motion to Reconsider - plf
12/9/2009	MOTN	JENNY	Motion to Strike Supplemental Affidavit of Motion to Reconsider
12/11/2009	ORDR	JENNY	Order Setting Hearing
	HRSC	JENNY	Hearing Scheduled (Hearing 01/19/2010 09:00 AM) Motion to Reconsider
1/15/2010	ORDR	JENNY	Amended Order Setting Hearing
	CONT	JENNY	Hearing result for Hearing held on 01/19/2010 09:00 AM: Continued Motion to Reconsider
	HRSC	JENNY	Hearing Scheduled (Hearing 02/02/2010 09:00 AM) Motion to Reconsider
2/2/2010	HRVC	JENNY	Hearing result for Hearing held on 02/02/2010 09:00 AM: Hearing Vacated Motion to Reconsider
	MISC	JENNY	**Court called for Mr. McCormack twice and the phone was never answered...hearing vacated and matter under advisement for written decision**
	ADVS	JENNY	Case Taken Under Advisement
2/3/2010	MOTN	JENNY	Motion to Reconsider, Further Information, Request for Oral Argument
2/9/2010	MOTN	JENNY	Motion to Strike Plaintiff's Motion to Reconsider, Further Information, Request for Oral Argument
3/1/2010	DEOP	JENNY	Memorandum Opinion and Order on Plaintiff's Motion to Reconsider
	STAT	JENNY	Case Status Changed: closed
3/11/2010	APSC	DEANNA	Appealed To The Supreme Court
	MOTN	DEANNA	Motion and Affidavit in Support for Appointment of Counsel
	MOTN	DEANNA	Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees
	REGISTER OF ACTIONS		
	NTAP	DEANNA	Notice Of Appeal

B

Robert James McCormack vs. Whitehead Amberson & Caldwell PLLC, Christopher E Caldwell

Date	Code	User	Judge
3/16/2010	MISC	JENNY	Defendant's Objection to Plaintiff's Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner)
3/18/2010		JENNY	Filing: 11 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Whitehead, Amberson & Caldwell Receipt number: 0005954 Dated: 3/18/2010 Amount: \$58.00 (Check) For: Caldwell, Christopher E (defendant) and Whitehead Amberson & Caldwell PLLC (defendant)
3/19/2010	NTHR	JENNY	Notice Of Hearing
	HRSC	JENNY	Hearing Scheduled (Hearing 04/13/2010 09:00 AM) Objection
	SCRT	DEANNA	Supreme Court Receipt - Clerk's Record due date Suspended
3/22/2010	STAT	JENNY	Case Status Changed: Closed pending clerk action
3/23/2010	AFFD	JENNY	Affidavit of Thomas Amberson in Support to Attorney Fees
	MISC	JENNY	Request for Additional Record
3/25/2010	AFFD	DEANNA	Affidavit of Robert McCormack
	MOTN	DEANNA	Motion and Affidavit in Support for Appointment of Counsel
3/30/2010	BNDC	DEANNA	Bond Posted - Cash (Receipt 6613 Dated 3/30/2010 for 100.00)
	BONC	DEANNA	Condition of Bond Estimate for costs of Additional Record requested.
4/1/2010	MISC	TERESA	Answer to Strike Affidavit of Thomas Amberson in Support of Attorney Fees
	AFFD	TERESA	Affidavit of Lori Moody--def
4/7/2010	SCRT	DEANNA	Supreme Court Receipt - Request for Additional Record filed at the SC
4/13/2010	DCHH	JENNY	District Court Hearing Held Court Reporter: Nancy Towler Number of Transcript Pages for this hearing estimated: less than 100 pages
	ADVS	JENNY	Hearing result for Hearing held on 04/13/2010 09:00 AM: Case Taken Under Advisement Objection

Date: 6/28/2010

Second Judicial District Court - Nez Perce County

User: DEANNA

Time: 12:34 PM

ROA Report

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Case: CV-2009-0001218 Current Judge: Carl B. Kerrick

Robert James McCormack vs. Whitehead Amberson Caldwell PLLC, etal.

Robert James McCormack vs. Whitehead Amberson & Caldwell PLLC, Christopher E Caldwell

Date	Code	User	Judge
4/13/2010	MINE	JENNY	Minute Entry Hearing type: Objection-Def's Motion to Proceed Partial Pmt Hearing date: 4/13/2010 Time: 9:28 am Courtroom: Court reporter: Nancy Towler Minutes Clerk: JENNY Tape Number: CTRM #1 ROBERT MCCORMACK - PRO SE THOMAS AMBERSON FOR DEFENDANT Carl B. Kerrick
4/29/2010	MOTN	JENNY	Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner) Carl B. Kerrick
	AFFD	JENNY	Affidavit of Robert James McCormack Carl B. Kerrick
5/26/2010	DEOP	JENNY	Memorandum Opinion and Order Denying Plaintiff's Motion for Partial Payment of Court Fees and Motion for Appointment of Counsel Carl B. Kerrick
6/21/2010	SCRT	DEANNA	Supreme Court Receipt - Clerk's Record due date suspended Carl B. Kerrick
	ORDR	DEANNA	Order Conditionally Dismissing Appeal received from the SC Carl B. Kerrick

ROBERT J. McCORMACK
IDOC # 32935
SICI - ND - A29
P.O. Box 8509
Boise, Idaho - 83707

FILED

2009 JUN 8 AM 10 03

Plaintiff Pro Se PATTY O. WEEKS
CLERK OF THE DIST. COURT

McCormack

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,

Plaintiff,

vs.

LAW FIRM OF - WHITEHEAD, AMBERSON,
& CALDWELL, P.L.L.C., and
CHRISTOPHER E. CALDWELL,

Defendants.

Case No. **CV09 01218**

CIVIL COMPLAINT

The Plaintiff complains and alleges as follows:

A.

PARTIES

1. The Plaintiff is now and has been a resident of the State of Idaho for a period of more than six (6) weeks prior to the commencement of this action.

2. Defendants are and have been a resident of the State and are citizens of Idaho whose address is: CHRISTOPHER E. CALDWELL ATT, 1221 F. ST. LEWISTON, IDAHO - 83501, and is employed as an attorney working with - WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C. - Attorneys At Law, at 2230 3rd Avenue North, Lewiston, Idaho - (208) 743-5299.

At the time the claims alleged in this complaint arose these Defendants were under a fiduciary duty to the Plaintiff. A fiduciary duty is the highest standard of duty implied by law.

CIVIL COMPLAINT - 1.

**Case Assigned to:
CARL B. KERRICK**

B.
JURISDICTION

Jurisdiction is asserted pursuant to: Idaho Code § 6-801; § 6-802; § 6-803; § 6-804; § 6-805; § 6-806; § 6-807.

The statute of limitations is the law that sets the period of time within which a civil law suit must be filed. The time begins to run when the injury occurs at the time of the injury's discovery. The statute of limitation period for personal injuries in Idaho State, where the claim arose, is two (2) years.

The date of the plaintiff's injury and the discovery of the plaintiff's injury is March 14, 2008 (3-14-08). (See Exhibit - A)

Both the plaintiff and the defendants are resident citizens of the State of Idaho.

C.
FIRST CAUSE OF ACTION

Plaintiff alleges that the following acts have been done that has rendered unfair loss to the plaintiff:

On May 14, 2001, plaintiff received his first Temporary Total Disability (TTD) check - from Claim 02836-1208 - of the Insured: All Valley Concrete Co. (D.O.I. File No. : 1001060) (See Exhibit - A);

On August 20, 2001, plaintiff retained defendant with an Attorney/Client Contract - Workers Compensation - Contract. Because, plaintiff contested the compensation offered to the plaintiff by EVEREST NATIONAL INSURANCE COMPANY in Claim No. 02836-1208.

In the Attorney /Client Contract, plaintiff agreed to pay to the Defendant, Mr. Caldwell, a total of "30 percent of any and all moneys that was recovered, including disputed medical benefits, subrogation recovery, and any award of attorney fees and costs, from the proceedings."

On August 21, 2001, Defendant RONDA K. NICHOLS, a paralegal to Defendant, CHRISTOPHER CALDWELL, wrote a letter to: Crawford & Company, ATN. LESLEE L. HAYLETT, at 146 South Cole Road, Boise, ID 83709, stating "...any and all TTD, PPI, Travel etc. benefits must come through this office for tracking purposes." (See Exhibit - B)

On December 15, 2008, EVEREST NATIONAL INSURANCE COMPANY wrote a letter stating "Sending disability payments to a party other than the claimant is unusual..." (See Exhibit -C).

The Plaintiff has no issue-problem with the \$8,826.40 granted to defendant Christopher Caldwell by the Industrial Commission of the State of Idaho, for Mr. Caldwell's costs and his 30% attorney fees.

The First Cause of Action is based upon the Following:

The checks sent to the offices of WHITEHEAD, AMBERSON & CALDWELL, PLLC, from 9/5/2001 - to - 2/14/2002 (See Exhibit - A) were deposited into the U.S. BANK - FOR DEPOSIT ONLY. The Plaintiff, Robert J. McCormack, did not receive the money these checks represent. The plaintiff - DECLARES: Mr. Robert J. McCormack did not sign the above listed checks - worth = \$11,012.87 (See Exhibit - D1.-thr-D6.) & (Exhibit - A).

SECOND CAUSE OF ACTION

Plaintiff alleges that the following act have been done that has rendered unfair damage to the Plaintiff:

The mishandled checks and the missing \$11,012.87, mentioned in the First Cause of Action above, that, has caused the plaintiff not to receive the missing \$11,012.87.

It is clear to the plaintiff that the money is missing due to a violation of Idaho Rules Of Professional Conduct (IROP) - Rule 8.4(c) which states:

"It is professional misconduct for a lawyer to: engage in conduct involving dishonesty, fraud, deceit or misrepresentation". Because, the said checks where cashed by the Law Office of the Defendant(s), yet, the money the checks represent was not received by the Plaintiff. Plaintiff alleges that Defendants, perhaps through defendant's staff or paralegal, engaged in conduct involving dishonesty, committing fraud, by signing Plaintiff's signature, using deceit by signing plaintiff's name-making it appear plaintiff had signed the check (the Plaintiff in fact did not sign), misrepresentation of plaintiff's signature.

The money is missing due to a violation of "IROP" - Rule 1.4(a)(3) which states: "A lawyer shall keep the client reasonably informed about the status of the matter". Because, had the above mentioned missing checks had been communicated on a monthly bases, the money the checks represent would not have come up missing. The Defendants did not keep the plaintiff reasonably informed about the status of the matter, which was about disability money, and medical expenses also.

The money is missing due to a violation of IROP - Rule 1.5(c) which states: "upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third, shall promptly render a full accounting regarding such property." Because, the money is missing due to the Defendant's Office receiving the checks representing the missing money, the funds, in which the plaintiff has an interest. The Defendant(s) did not promptly notify the plaintiff-client what

was being done with the money the checks represented. Plaintiff did not agree to forfeit the money the checks represent. And, the Defendant(s) did not promptly deliver to the plaintiff any funds - represented by the checks listed in the First Cause of Action - to the plaintiff of those funds that the plaintiff is entitled to receive. Plaintiff request said funds be rendered to plaintiff in a full accounting regarding such property.

The money the checks represent was sent to the Defendants' Law Office due to a violation of IROPC - Rule 4.1(a) which states: "In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person." Because, the defendant , through his paralegal, RONDA K. NICHOLS (See Exhibit - B), knowingly made a false statement of material fact to a third person stating "I will then disburse those benefits to Mr. McCormack." (See Exhibit-B)

The checks representing the missing money were sent to defendants' office due to a violation of IROPC - Rule 8.4(c) which state: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Because, through the Defendants' paralegal, the checks were sent to the defendants' office. "Sending disability payments to a party other than the claimant is unusual,..." (See Exhibit - C) The checks were sent to the defendants' office because of the dishonesty of the plaintiff's likelihood of - he "would soon be incarcerated." (See Exhibit-C) This was dishonest because: The first check started going to the Defendants' Offices on September 5, 2001. However, plaintiff had not been charged with criminal Code until much later on April 13, 2002. Then, the said checks, representing the missing \$11,012.87, were fraudulently signed plaintiff's name-practicing deceit and misrepresentation. The Defendants were receiving plaintiff's checks seven (7) months before plaintiff's arrest (See Exhibit-E).

Please see Plaintiff's signature - hand writing on (Exhibits F1. & F2.) Compare plaintiff's signature from (Exhibits F1. & F2.) to the signatures on (Exhibits D1. -thru- D12). The signatures on (Exhibit D1. -thru- D12) vary in difference. Plaintiff did not receive the money the checks on (Exhibit D1. -thru- D12) represent. That is the missing money in this Cause of Action. "[I]t is possible that your name was forged on some of the checks sent in care of your attorney[.]" (See Exhibit-G). Mr. Caldwell's Workers' Compensation Paralegal - RONDA K. NICHOLS - could be suspected of mishandling these checks, causing the money to be missing. It is possible the missing money is in the Defendants' Bank Account - without knowledge of it not being disbursed to the Plaintiff, or, perhaps, the money is missing completely. Please examine the signature on (Exhibit-H) and compare it to the signatures found on (Exhibits-D2-thru-D12).

The above actions and inaction, in this Cause of Action, has caused the Plaintiff the hardships that follow:

On September 5, 2001: Because the Defendants lost, or took, 100% of plaintiff's Temporary Total Disability (TTD) payment, Plaintiff could not pay the electric bill which was in the plaintiff's friend's name. Plaintiff was residing with this friend. Plaintiff's friend was expecting payment of this bill.

On September 19, 2001: Because the Defendants took, or lost, 100% of the plaintiff's (TTD) payment, plaintiff could not pay for the water bill that plaintiff used often, while he was residing at his friend's house. Plaintiff's friend was expecting plaintiff to pay for water, to ease the burden of the water expense.

On October 3, 2001: The Defendants kept 100% of plaintiff's (TTD) payment. This caused plaintiff to be unable to pay for insurance on his car.

This caused plaintiff to be forced to find other means of transportation.

On October 24, 2001: The Defendants kept 100% of Plaintiff's (TTD) payment. This caused Plaintiff to be unable to purchase food for himself, and his friend in the household, which would sometime include plaintiff's friend's brothers staying in the home.

On November 7, 2001: The Defendants kept 100% of the plaintiff's (TTD) payment. At this point, plaintiff was asked to leave plaintiff's friend's household for not paying his way - which his friend was relying upon for financial help from the plaintiff. Defendant(s) had caused plaintiff to become a burden upon his friend - plaintiff was without funds.

On December 5, 2001: Caused by the lack of funds, the plaintiff was forced to stay where ever he could. The plaintiff was even forced to live in his car, causing great distress, confusion and depression. Many times the plaintiff had to wear his clothes until he could find a place to wash the clothes and have a shower to use. (These are winter months.)

On December 19, 2001: Caused by the 100% lack of (TTD) payment funds, the plaintiff was forced to barrow from who ever plaintiff could barrow from. (Plaintiff still owes people that he has been unable to pay back - to this vary day.)

On January 2, 2002: Caused by the total lack of money, because Defendant kept 100% of the (TTD) payments - above, and beyond the 30% of attorney fees and expenses - (listed in the First Cause of Action), plaintiff was unable to look for work, or even work, because of his on going injuries. This caused great anxiety, distress and depression. Plaintiff was unable to buy anything for his daughter or grandchildren for Christmas, or their birthdays.

On January 16, 2002: Caused by the 100% of the (TTD) payment being taken, plaintiff had no money - or any type of financial help. Plaintiff

fell deeper into a depressed state of mind. Plaintiff felt the whole world was against him and he felt useless - for anything plaintiff had considered doing.

On January 30, 2002: Caused by the Defendants keeping 100% of plaintiff's (TTD) payment, this caused trying to keep all plaintiff's appointments impossible. At this very same time, plaintiff continued to suffer from his injuries - which caused him to retain the Defendant(s) in the first place. All of this was very discouraging, emotionally painful. With no money for buying gas, it was also very hard to find rides to make appointment.

On February 13, 2002: Caused by the Defendants taking 100% of the (TTD) payment, it caused the plaintiff great additional havoc, and distrust from the plaintiff's family members. Plaintiff's family members began to see him as - not trying to fulfill his obligations of getting the plaintiff back to employment and/or starting Disability Funds. Plaintiff did earnestly try. But, however, he was unable to achieve these goals. Plaintiff's family members started to believe he was trying to free load and, trying to get over on them. This too was very distressful upon the Plaintiff.

NOTE: Defendant(s) were only entitled to 30% of the settlement plus expenses. However, the defendats received 30%, all expenses - plus 100% of the (TTD) money - of the checks listed above. (See Exhibit-D2 -thr- D12)

THIRD CAUSE OF ACTION

Plaintiff alleges that the following acts have been done that has rendered unfair damage to the Plaintiff:

The mishandling of the plaintiff's Vocational Rehabilitation Counselor & Consultant, DEBRA J. UHLENKOTT, M.Ed, CRC.

The Mishandling of DEBRA J. UHLENKOTT constitutes a form of negligence which has caused harm to the Plaintiff.

Defendant, CHRISTOPHER CALDWELL, violated Idaho Rules of Professional Conduct (IROP) - Rule 1.1, which states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation." Because, MR. CALDWELL did not provide competent representation to the plaintiff, in that, his skill of thoroughness failed in the preparation. "It appears she simply was not given adequate time to perform a credible analysis." (See EXHIBIT I.2) & (Also EXHIBIT - I.1 & I.3) This is one example of the Defendant's negligence to prepare a reasonably and very necessary presentation for the Plaintiff's representation.

Defendant Mr. Caldwell also violated (IROP)-Rule 1.3, which states: "A lawyer shall act with reasonable diligence and in representing a client." Because, Defendant, Mr. Caldwell, did not act with reasonable diligence - (See EXHIBITS - I.2 & I.3). Mr. Caldwell's negligence to the expert's help - of an expert witness - Counselor & Consultant - DEBRA J. UHLENKOTT, M.Ed, CRC, prevented reasonable diligence and the reasonable representation of the plaintiff's Disability Claim.

The plaintiff was suffering from "serious injuries" (See Exhibit -J). These serious injuries still to - today's very date "requires additional reasonable and necessary medical care as a result of his April 9, 2001 industrial accident" (See Exhibit -K).

ADDITIONAL INFORMATION

On April 9, 2001, the Plaintiff was struck by a concrete bucket that weighed about 2000 lbs - while the plaintiff was working for - All Valley Concrete - Owner, Doug Weld.

At the time of being struck and injured, shock prevented the plaintiff from feeling the seriousness of the injury. The plaintiff was still numb from bending over constantly also, doing his job. Plaintiff's job consisted of screening - (pulling concrete to the right height with a 2"x4"x8' board - with other co-workers on the other end of the board). When struck with the bucket, the plaintiff was knocked forward, while he also was trying to stay clear of the finished work. Then, the plaintiff stumbled toward one side although he was struck from the back.

Later, toward the end of the week, the plaintiff started suffering serious pains in his lower spine, and between his shoulder blades - when he lifted above his head. Then, the plaintiff was advised by co-worker, Virgil Holt, to seek medical examination on April 13, 2001. At this point, the plaintiff went and had a M.R.I., which showed a Herniated Disc at the L.3-4; & L.4-5, with seepage of body water. Then, the plaintiff filed for workmans' compensation - out of his pay checks, which plaintiff was entitled.

About May 14, 2001, Plaintiff received his first compensation check. Plaintiff continued to receive his compensation check until August 22, 2001.

About August 22, 2001, the plaintiff called the Insurance Company. The Insurance Company said - they discontinued the plaintiff's Workman's Compensation checks. At this point, the plaintiff started looking for an attorney - at law, who could help the plaintiff with the plaintiff/claimant's compensation claim. Plaintiff came to Defendant(s) Offices, and to Defendant - Mr. CALDWELL's Office. Plaintiff discussed his compensation claim with Mr. Caldwell, explaining the situation to Mr. Caldwell. The plaintiff and Mr. Caldwell signed a contract about a couple of days later.

After the contract was signed, the Plaintiff had no knowledge that the Offices of WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C., the Defendant(s), had
CIVIL COMPLAINT - 10.

100% of the remaining (TTD) checks started up again, and then, had all of these said checks sent to the Offices of - WHITEHEAD, AMBERSON & CALDWELL, the - Defendant(s).

Later, the plaintiff stopped into the Law Offices of - Whitehead, Amberson & Caldwell, the Defendant(s) - once in awhile, to see what has developed with plaintiff's claim, and to let Mr. Caldwell know the plaintiff was still going to his physical therapy. Mr. Caldwell stated that he had not heard anything.

At this point, plaintiff continued to make the increasingly more difficult appointments. (These appointments were made more difficult to make because - the Defendant(s) were keeping 100% of plaintiff's remaining (TTD) checks - as outlined in the First & Second Causes of Actions listed above.)

Plaintiff had mentioned to Mr. Caldwell that the plaintiff was beginning to become in need of some financial help. Plaintiff informed Mr. Caldwell that the plaintiff was - hanging in there.

At this point, the plaintiff was financially broke - living here and there, not being able to work because of the plaintiff's injury. This caused the plaintiff to become more distressed and resulting depressed.

All of the Doctors the plaintiff consulted with agreed that the Plaintiff had herniated discs. And they agreed the plaintiff was (and still is) suffering some type of pain. The plaintiff's primary doctors supplied him with some medication - for plaintiff's injuries.

The plaintiff was notified, by a friend who allowed him to stay in the friend's home-once in awhile- and to use the friend's phone, as a message phone, stated that the plaintiff's attorney called. Saying - Mr. Caldwell wanted to talk to the plaintiff. At that point, the plaintiff found a ride to Mr. Caldwell's office. While at Mr. Caldwell's office, Caldwell stated

that the Insurance Company made an offer to settle the claim. Plaintiff declined the offer. Because, the offer was not worth the pain and suffering plaintiff had been suffering. And, the Insurance Company declined to pay for the Medical Care - to repair the damage to plaintiff's back.

As of that date, the plaintiff still suffered from the injuries he has been damaged by. And if the plaintiff missed appointments for medical treatment, the appointments were re-scheduled. The Plaintiff continued his physical therapy - which was painful for him, when he was bent around in different directions. This pain compelled the plaintiff to take pain medication.

About 30 minutes before the plaintiff's appointments, plaintiff stopped by Mr. Caldwell's law office, to check if anything had developed on his case. It seemed to the plaintiff nothing was being done for him. All the plaintiff wanted was to have his back fixed, so he could continue back to his original profession. (Plaintiff was offered an eight (8) year long job - on a Highway near Couer D' Alene, Idaho.)

Plaintiff states that Mr. Caldwell neglected to represent him in a professional manner. Mr. Caldwell neglected to use "DEBRA J. UHLENKOTT", an expert witness in these matters to argue on behalf of the plaintiff. Nor, did Mr. Caldwell use DEBRA J. UHLENKOTT as an expert witness for Medical Treatment, or benefits that the plaintiff should be entitled to.

The plaintiff is still injured and suffering from those injuries every-day - up to date.

The evidence shows that the plaintiff was hoping for money to help him and Medical Treatment, so he could recover from the medical injuries. Plaintiff believes that Mr. Caldwell allowed the Insurance Company to walk away without the plaintiff receiving the proper Medical Care or financial

CIVIL COMPLAINT - 12.

compensation. The Plaintiff is still suffering from the injuries mentioned above.

On July 24, 2002, a check for plaintiff's Permanent Partial Disability (PPD) payment, of \$4,083.75, which Mr. Caldwell received 25%, arrived at his office. Plaintiff signed that at his office. At that point in time, the money from that check was a great help to the plaintiff's situation he was in.

On February 18, 2002, a transportation cost check, from the Insurance Company, was issued to the plaintiff for the amount of \$94.67. Mr. Caldwell gave this check to the plaintiff.

On February 28, 2002, one more transportation cost check, from the Insurance Company (See Exhibit-A), was issued to the plaintiff for the amount of \$100.00. Mr. Caldwell also gave this check to the plaintiff.

These two (2) checks were issued so the plaintiff could pay for transportation to Spokane, WA. However, the checks were not adequate enough to pay for both the Bus Ticket and Motel Room.

These are the checks that the Staff at the Offices of Whitehead, Amberson & Caldwell, PLLC, seen me signing in their office. (Defendants have claimed plaintiff signed the "mishandled checks." - Plaintiff did not sign the checks that represent the missing money - that has been outlined within the above Causes of Actions.).

On April 13, 2002, Plaintiff was arrested for felony D.U.I. . At this time, plaintiff was frequently sleeping in his car - for lack of money. Plaintiff was arrested after he woke-up from the cold. The plaintiff still had beer on his breath from - before he went to sleep. After waking-up, the plaintiff started driving to find a place to clean up. This is when he was arrested for D.U.I. . Sleeping and living in plaintiff's car was caused by a lack of money.

On July 7, 2002, the plaintiff was sent to prison - to go through a Therapy Community Center, for non-violent crimes, because the plaintiff was compelled to live and sleep in his car.

Although plaintiff was now in prison, the plaintiff felt more safe there. The prison was helping the plaintiff survive the lack of money he was suffering from. The prison was providing a place to sleep and food to eat. However, the plaintiff still continued to suffer from the injuries to his back. The prison provided very minimal medication for the plaintiff's pain and suffering. The plaintiff complaints of the pain and suffering were basically minimized by ignoring his requests for medical help.

The plaintiff then contacted Mr. Caldwell to inquire if there was anything Mr. Caldwell could help the plaintiff with. Mr. Caldwell stated - He could not help. And, there was an Industrial Commission hearing coming soon. Mr. Caldwell also asked - when was the plaintiff being released. Plaintiff informed Mr. Caldwell that plaintiff would be released in July -or- August, of 2004.

In August, of 2004, the plaintiff was released from prison. At this point in time, Mr. Caldwell changed the date of the Industrial Commission hearing.

In August, of 2004, the plaintiff was released on parole. The plaintiff was sent to stay in a motel, in Lewiston, Id. The plaintiff went to different churches in Lewiston seeking help - for a place to stay. The plaintiff also went to. Caldwell's office, to obtain information about plaintiff's workman's compensation case. Mr. Caldwell told the plaintiff - He would contact the plaintiff. And, find a phone where Mr. Caldwell could contact the plaintiff.

Then, the plaintiff signed-up for College Courses. Plaintiff had Pell Grants to pay for his H.-Vac. Courses at this point in time. Vocational Reha-

-bilitaion paid for plaintiff's new tools. Plaintiff went to his primary Doctor - to ask for medication- for the plaintiff's ongoing pain and suffering -including anti-inflammatory medication.

Plaintiff began receiving Food Stamps - to help him. A pastor of a church also helped the plaintiff with two months rent - on a studio apartment.

The plaintiff also received help with a phone that can be used - from an Agency that helps people in need - if they have the funds.

The plaintiff was trying to make good with what he had - while going to school. But, the plaintiff finally started falling behind on his bills. Meantime, the plaintiff and Mr. Caldwell had an Industrial Commission-Workman's Compensation hearing coming-up in front of Referee - Doug Donahue.

About one month earlier, Mr. Caldwell stated to the plaintiff - The Insurance Company had made an offer of \$60,000.00. Mr. Caldwell said - The plaintiff should take the offer. The plaintiff then asked, if the Insurance Company would pay for the plaintiff's Medical Expenses - to get plaintiff's back repaired. Mr. Caldwell stated - No. The Insurance Company would not pay Medical Expenses - for that.

At that time, plaintiff informed Mr. Caldwell, plaintiff would decline the offer. Then, Mr. Caldwell seemed very up set. Plaintiff then asked - did the Insurance Company make him an offer - to through the plaintiff's case? At this point, Mr. Caldwell became very up set and asked the plaintiff if the plaintiff wanted to fire him. The plaintiff replied - No. At this point in time, the plaintiff was trying to learn - why did Mr. Caldwell feel that plaintiff should take this offer. And, why Mr. Caldwell figured - the plaintiff should not call his co-worker witnesses.

Now, at this point in time, the plaintiff was getting behind in paying on his bills. Every place he went told him - They had no funds to help the

disabled plaintiff. With no funds available to the plaintiff, and his trying to go to school, while receiving no help from Workman's Compensation payments, the plaintiff was compelled to sell some of his pain medication - to pay for his phone and electric bills.

The plaintiff not being able to work - and still suffering from his back injuries - the plaintiff started becoming more - and more stressed. At this point in time, the plaintiff was introduced to a Confidential Informant - who reported the plaintiff for trading money for nine (9) methadone pain pills. Then, the plaintiff was arrested for delivery of a controlled substance. The plaintiff then received a seven (7) year sentence with $2\frac{1}{2}$ years mandatory term in prison - for trading nine (9) pills for a small amount of money. The plaintiff is still incarcerated for trading nine (9) pills - because of the distressful situation the Defendant(s) caused by keeping 100% of the \$11,012.87, of the missing money - outline within the First and Second Cause of Actions - listed above.

The plaintiff is still suffering from the pain of his back injuries, the distress that causes the plaintiff additional pain and suffering - and the resulting incarceration - caused by the Defendants loosing the plaintiff's missing \$11,012.87 .

Currently in prison, the plaintiff is having problems with the prison's Medical Services - and the Department of Corrections, caused by the negligent acts and inactions of the Defendants - in this present case.

D.
PREVIOUS LAWSUIT

1. Plaintiff began a lawsuit in Idaho State Court dealing with much of the same facts, without the clarification - outlined within this present lawsuit.

a. Parties to the previous lawsuit:

Plaintiff: ROBERT J. McCORMACK

Defendant: CHRISTOPHER E. CALDWELL

b. Name and location of court and case number:

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

CASE NO. CV - 2008 - 00736

c. Disposition of lawsuit:

The civil case - CV-2008-00736 was dismissed WITHOUT PREJUDICE on the 13th day of April 2009, for lack of Summons being properly served.

d. Issues raised:

The Plaintiff was un-satisfied with his worker's compensation coverage for his medical, so he hired the Defendant, an attorney, to pursue legal action for medical expenses and lost wages. On January 28, 2008, the Plaintiff filed a Complaint Against Attorney for Malpractice. In the Complaint, the Plaintiff alleged the Defendant negligently performed his duties as attorney for the Plaintiff.

e. The date of filing the previous lawsuit: January 28, 2008

f. The date of disposition of the previous lawsuit: April 13, 2009

E.
REQUEST FOR RELIEF

FIRST CAUSE OF ACTION

Plaintiff request for following relief for First Cause of Action:

For the proximate cause - that caused the Plaintiff financial injuries, the negligent acts that were contributory to the injury - without which such injury would not have resulted, caused the misplaced - missing \$11,012.87 - listed and explained within the First Cause of Action must be paid to the Plaintiff.

\$11,012.87

Plus:

Due to the Defendants being under a Fiduciary Duty to the Plaintiff, the highest standard of duty, and the resulting damage due to the negligence to keep the missing funds in order - then not disbursing the \$11,012.87 benefits to Mr. McCormack - punitive damage of (\$11,012.87 X 3) be paid to the Plaintiff.

\$33,038.61

A Total Amount \$44,051.48

SECOND CAUSE OF ACTION

Plaintiff request for following relief for Second Cause of Action:

For the proximate cause - that caused the Plaintiff financial injuries, the violations of the Idaho Rules of Professional Conduct (IROP) standard of duty, the negligent acts that lead to misplacing or misusing the Plaintiff's missing \$11,012.87 that was contributory to the injury to Plaintiff - without which such injury would not have resulted, and the cause listed and explained within the Second Cause of Action, the Plaintiff must be paid.

\$11,012.87

Due to the Defendants being under a fiduciary Duty, and under the Idaho Rules of Professional Conduct, and the Defendants violation of their duty, and these Rules - and the resulting damage to the Plaintiff caused by these violations and negligence, keeping Plaintiff's \$11,012.87 - then not disbursing the missing funds to Mr. McCormack - punitive damage of (\$11,012.87 X 3) should be paid to the Plaintiff.

\$33,038.61

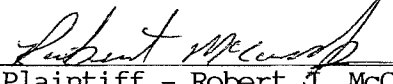
A Total Amount \$44,051.48

THIRD CAUSE OF ACTION

Plaintiff request for following relief for the Third Cause of Action:

For the proximate cause - that caused the Plaintiff's medical financial damage, medical damage, and additional proximate damages - caused by the Defendants' actions and inaction, outlined within the Third Cause of Action, where the Defendants were under a fiduciary duty and the resulting damage - including the proximate cause of Plaintiff now being incarcerated, outlined and explained in the Third Cause of Action, caused by the lack of using DEBRA J. UHLENKOTT - Vocational Rehabilitation Counselor & Consultant - as an expert witness - and the other damage of pain and suffering, explained in the Third Cause of Action, Plaintiff should be paid.

\$500,000.00


Plaintiff - Robert J. McCormack - Pro Se

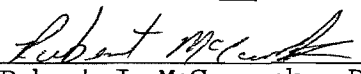
AFFIDAVIT OF FACTS IN SUPPORT OF DECLARATION UNDER PENALTY OF PERJURY

STATE OF IDAHO)
)SS
COUNTY OF ADA)

I, ROBERT J. McCORMACK, being first duly sworn on oath, deposes and says: I declare under penalty of perjury that I am the plaintiff in the above action, that I have read the above complaint and that the information contained in the complaint is true and correct to the best of my knowledge.

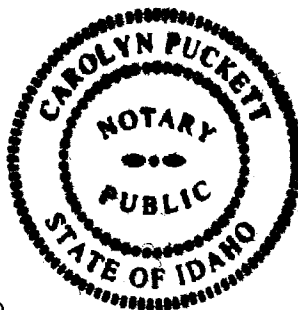
Further your affiant sayeth naught.

Executed at State of Idaho Correctional Institution 20 day of MAY, 2009


Robert J. McCormack - Pro Se

SUBSCRIBED AND SWORN AND AFFIRMED TO before me this 20th day of May, 2009

(SEAL)




Notary Public for Idaho
Commission Expires: 6-17-15

1/27/2009

Payments Issued for Claim 02836-1208

Claimant: Robert J. McCormack

Insured: All Valley Concrete

DOI File No: 1001060

Check No.	Payee	Issue Date	Benefit Type	Period	Amount	Address
Indemnity Payments (Temporary and Permanent Disability)						
84559338	Robert J. McCormack	5/14/2001	Temp Total Dis	4/30/01 - 5/14/01	\$ 954.64	P.O. Box 213, Lapwai, ID 83540
84567222	Robert J. McCormack	5/29/2001	Temp Total Dis	5/15/01 - 5/29/01	\$ 954.64	P.O. Box 213, Lapwai, ID 83540
84574692	Robert J. McCormack	6/12/2001	Temp Total Dis	5/30/01 - 6/13/01	\$ 954.64	P.O. Box 213, Lapwai, ID 83540
84913218	Robert J. McCormack	6/28/2001	Temp Total Dis	6/14/01 - 6/27/01	\$ 891.00	P.O. Box 213, Lapwai, ID 83540
84919842	Robert J. McCormack	7/11/2001	Temp Total Dis	6/28/01 - 7/11/01	\$ 891.00	P.O. Box 213, Lapwai, ID 83540
84925908	Robert J. McCormack	7/25/2001	Temp Total Dis	7/12/01 - 7/25/01	\$ 891.00	P.O. Box 213, Lapwai, ID 83540
84938058	Robert J. McCormack	8/8/2001	Temp Total Dis	7/26/01 - 8/8/01	\$ 891.00	P.O. Box 213, Lapwai, ID 83540
85310091	Robert J. McCormack	8/22/2001	Temp Total Dis	8/09/01 - 8/22/01	\$ 891.00	P.O. Box 213, Lapwai, ID 83540
85322142	Robert J. McCormack c/o Whitehead, Amberson & Caldwell	9/5/2001	Temp Total Dis	8/23/01 - 9/05/01	\$ 891.00	P.O. Box 607, Lewiston, ID 83501
85329693	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	9/18/2001	Temp Total Dis	9/06/01 - 9/19/01	\$ 891.00	P.O. Box 607, Lewiston, ID 83501
85621662	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	10/3/2001	Temp Total Dis	9/21/01 - 10/03/01	\$ 891.00	P.O. Box 607, Lewiston, ID 83501
85633767	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	10/22/2001	Temp Total Dis	10/04/01 - 10/24/01	\$ 1,036.50	P.O. Box 607, Lewiston, ID 83501
85845915	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	11/6/2001	Temp Total Dis	10/25/01 - 11/07/01	\$ 891.00	P.O. Box 607, Lewiston, ID 83501
85857768	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	11/19/2001	Temp Total Dis	11/08/01 - 11/21/01	\$ 891.00	P.O. Box 607, Lewiston, ID 83501
86141421	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	12/6/2001	Temp Total Dis	11/22/01 - 12/05/01	\$ 891.00	2230 3rd Ave., Lewiston, ID 83501
86149197	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	12/17/2001	Temp Total Dis	12/06/01 - 12/19/01	\$ 891.00	P.O. Box 607, Lewiston, ID 83501
86157027	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	12/31/2001	Temp Total Dis	12/20/01 - 1/02/02	\$ 891.00	P.O. Box 607, Lewiston, ID 83501
86167962	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	1/18/2002	Temp Total Dis	1/03/02 - 01/16/02	\$ 891.00	P.O. Box 607, Lewiston, ID 83501
86406939	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	1/31/2002	Temp Total Dis	1/14/02 - 1/30/02	\$ 1,010.57	P.O. Box 607, Lewiston, ID 83501
86418945	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	2/14/2002	Temp Total Dis	1/31/02 - 2/13/02	\$ 946.80	P.O. Box 607, Lewiston, ID 83501
Temporary Disability Sub-Total:					\$18,331.79	
81203997	Robert J. McCormack c/o Christopher Caldwell, Atty at Law	7/24/2002	Perm Partial Dis	7/24/02 - 7/24/02	\$ 4,083.75	P.O. Box 607, Lewiston, ID 83501
91866267	Whitehead, Amberson & Caldwell, PLLC	12/19/2008	Perm Partial Dis	7/27/06 - 7/27/06	\$ 7,825.45	P.O. Box 607, Lewiston, ID 83501
91870443	Whitehead, Amberson & Caldwell, PLLC	2/12/2007	Perm Partial Dis	7/27/06 - 7/27/06	\$ 1,000.00	P.O. Box 607, Lewiston, ID 83501
395861436	Marcelline Meza Guardian on behalf of Robert McCormick	3/14/2008	Perm Partial Dis	7/27/06 - 7/27/06	\$ 7,509.55	2883 N Track Rd., Wapato, WA 98951
Permanent Disability Sub-Total:					\$20,418.75	
Indemnity Payment Sub-Total:					\$38,750.54	
Medical Payments						
84920517	Sports PT Clinic	7/12/2001	Med Treatment	5/4/01 - 5/24/01	\$ 282.00	328 Warner Dr., Lewiston, ID 83501
84922326	Ne Mee Poo Health	7/17/2001	Med Treatment	5/15/01 - 5/15/01	\$ 63.89	P.O. Drawer 367, Lapwai, ID 83540
84926709	Lewis Clark Radiology	7/26/2001	Med Treatment	6/05/01 - 6/05/01	\$ 207.00	531 Fourth Ave., Lewiston, ID 83501
84926718	Ne Mee Poo Health	7/26/2001	Med Treatment	4/13/01 - 4/30/01	\$ 229.22	P.O. Drawer 367, Lapwai, ID 83540
84926736	St. Joseph Reg. Med. Ctr.	7/26/2001	Med Treatment	6/06/01 - 6/05/01	\$ 825.00	P.O. Box 816, Lewiston, ID 83501
85307139	Lewiston Orthopaedic Assoc.	8/20/2001	Med Treatment	6/21/01 - 6/21/01	\$ 306.99	320 Warner Dr., Lewiston, ID 83501
85307148	St. Joseph Reg. Med. Ctr.	8/20/2001	Med Treatment	7/22/01 - 7/22/01	\$ 790.00	P.O. Box 816, Lewiston, ID 83501
85312989	Lewis Clark Radiology	8/24/2001	Med Treatment	7/22/01 - 7/22/01	\$ 209.00	531 Fourth Ave., Lewiston, ID 83501
85845888	Jean K. Thomas, MD	11/6/2001	Med Treatment	9/18/01 - 9/18/01	\$ 225.16	338 6th Street, Lewiston, ID 83501
85851666	Lewiston Orthopaedic Assoc.	11/12/2001	Med Treatment	7/30/01 - 7/31/01	\$ 113.43	320 Warner Dr., Lewiston, ID 83501
86149377	Ne Mee Poo Health	12/17/2001	Med Treatment	7/31/01 - 8/26/01	\$ 115.81	P.O. Drawer 367, Lapwai, ID 83540
86149395	Ne Mee Poo Health	12/17/2001	Med Treatment	8/30/01 - 8/30/01	\$ 51.13	P.O. Drawer 367, Lapwai, ID 83540
#86152599	Robert J. McCormack c/o Whitehead, Amberson & Caldwell	12/19/2001	Transportation	12/03/01 - 12/04/01	\$ 94.67	P.O. Box 607, Lewiston, ID 83501

I cashed.

SENT TO CALDWELL'S OFFICE.

CALDWELL GOT 25% of 200?

Check No.	Payee	Issue Date	Benefit Type	Period	Amount	Address
86152689	Sports PT Clinic	12/19/2001	Physiotherapy	11/20/01 - 11/20/01	\$ 72.00	328 Warner Dr., Lewiston, ID 83501
86152968	CorVel Corporation - Mt. Vernon	12/19/2001	Nursing Care	11/05/01 - 11/27/01	\$ 478.00	1932 E. College Way, #B, Mt. Vernon, WA 98273
86160474	Ne Mee Poo Health	1/8/2002	Med Treatment	9/26/01 - 9/26/01	\$ 51.13	P.O. Drawer 367, Lapwai, ID 83540
86167665	ONE Plus/Spokane	1/17/2002	Med Treatment	12/4/01 - 12/04/01	\$ 550.00	8606 N Wall St., #200, Spokane, WA 99218
86406687	Sports PT Clinic	1/31/2002	Med Treatment	12/28/01 - 12/28/01	\$ 72.00	328 Warner Dr., Lewiston, ID 83501
86410233	Sports PT Clinic	2/4/2002	Med Treatment	12/6/01 - 12/6/01	\$ 72.00	328 Warner Dr., Lewiston, ID 83501
86410314	Sports PT Clinic	2/4/2002	Med Treatment	12/13/01 - 12/20/01	\$ 144.00	328 Warner Dr., Lewiston, ID 83501
86411322	CorVel Corporation - Mt. Vernon	2/5/2002	Med Treatment	12/4/01 - 12/20/01	\$ 209.00	1932 E. College Way, #B, Mt. Vernon, WA 98273
86418387	CorVel Corporation - Mt. Vernon	2/13/2002	Med Treatment	1/02/02 - 1/02/02	\$ 226.30	1932 E. College Way, #B, Mt. Vernon, WA 98273
86418441	Nimilpuu Health	2/13/2002	Med Treatment	10/11/01 - 10/25/01	\$ 130.68	P.O. Drawer 367, Lapwai, ID 83540
#86420115	Robert J McCormick c/o Christopher Caldwell	2/18/2002	Transportation	12/3/01 - 12/04/01	\$ 94.67	P.O. Box 607, Lewiston, ID 83501
#86427009	Robert J McCormick c/o Christopher Caldwell	2/28/2002	Transportation	2/28/02 - 2/28/02	\$ 100.00	P.O. Box 607, Lewiston, ID 83501
86429178	Ne Mee Poo Health	3/6/2002	Med Treatment	11/13/01 - 11/13/01	\$ 60.43	P.O. Drawer 367, Lapwai, ID 83540
86645277	ONE Plus/Spokane	4/4/2002	Med Treatment	3/6/02 - 3/6/02	\$ 247.50	8606 N Wall St., #200, Spokane, WA 99218
86645286	Twin Rivers Neurosurgical Associate	4/4/2002	Med Treatment	1/14/02 - 2/18/02	\$ 258.56	324 5th Street, Lewiston, ID 83501
86645295	Ne Mee Poo Health	4/4/2002	Med Treatment	12/11/01 - 12/11/01	\$ 67.00	P.O. Drawer 367, Lapwai, ID 83540
86645304	CorVel Corporation - Mt. Vernon	4/4/2002	Nursing Care	2/4/02 - 2/28/02	\$ 233.60	1932 E. College Way, #B, Mt. Vernon, WA 98273
86645313	Sports PT Clinic	4/4/2002	Physiotherapy	11/12/01 - 2/15/02	\$ 546.00	328 Warner Dr., Lewiston, ID 83501
86648994	William Borzarth, MD	4/12/2002	Med Treatment	2/7/02 - 2/7/02	\$ 1,027.51	801 5th Ave, #112, Spokane, WA 99204
86897619	CorVel Corporation - Mt. Vernon	5/14/2002	Nursing Care	4/1/02 - 4/29/02	\$ 182.50	1932 E. College Way, #B, Mt. Vernon, WA 98273
86904666	Nimilpuu Health	5/30/2002	Med Treatment	2/27/02 - 2/27/02	\$ 52.81	P.O. Drawer 367, Lapwai, ID 83540
86914665	CorVel Corporation - Mt. Vernon	6/24/2002	Nursing Care	5/3/02 - 5/30/02	\$ 175.20	1932 E. College Way, #B, Mt. Vernon, WA 98273
86918436	ONE Plus/Spokane	7/11/2002	Med Treatment	4/10/02 - 4/10/02	\$ 660.00	8606 N Wall St., #200, Spokane, WA 99218
87201603	CorVel Corporation - Mt. Vernon	7/19/2002	Nursing Care	6/6/02 - 6/26/02	\$ 153.30	1932 E. College Way, #B, Mt. Vernon, WA 98273
87203988	Ne Mee Poo Health	7/24/2002	Med Treatment	5/24/01 - 6/8/01	\$ 169.92	P.O. Drawer 367, Lapwai, ID 83540
87204897	CorVel Corporation - Mt. Vernon	7/25/2002	Nursing Care	3/1/02 - 3/27/02	\$ 211.70	1932 E. College Way, #B, Mt. Vernon, WA 98273
Medical Payment Sub-Total:					\$ 9,759.11	
Total Paid:					\$48,509.65	

copies of highlighted checks provided

#copies of checks have been requested but not received

Johns



Whitehead, Amberson & Caldwell, P.L.L.C.
ATTORNEYS AT LAW

Richard Whitehead

admitted in Idaho, Washington, and Montana
Certified Workers' Compensation Specialist

Thomas B. Amberson

admitted in Idaho and Oregon

Christopher Caldwell

admitted in Idaho and Washington

Offices in Coeur d'Alene
and Lewiston

August 21, 2001

*Sent via facsimile * Original to follow via U.S. Mail*

Crawford & Company
ATTN: LESLEE L. HAYLETT
146 South Cole Road
Boise ID 83709
Facsimile: (208) 375-4514

Dear Ms. Haylett:

RE: Our Client : Robert McCormick
Your Insured : All Valley Concrete
DOI : 04/09/01
Claim No. : 171-64501

This letter follows our telephone conversation of today's date, wherein, I advised that in addition to all correspondence, any and all TTD, PPL, Travel etc., benefits must come through this office for tracking purposes. I will then disburse those benefits to Mr. McCormick. Please forward those benefits to Mr. McCormick in c/o Christopher Caldwell, PO Box 607, Lewiston, Idaho 83501.

Thank you for your time and attention to this matter. Please feel free to contact our office should you have any further questions or concerns.

Sincerely,

Whitehead, Amberson & Caldwell, P.L.L.C.,

Ronda K. Nichols
Workers' Compensation Paralegal to
Christopher Caldwell, Attorney at Law

RN:rkn

cc: Robert McCormick via U.S. Mail only

RECEIVED
AUG 23 2001
CRAWFORD & C

2230 3rd Avenue North • Lewiston, Idaho 83501
Mail - Post Office Box 607 • Lewiston, Idaho 83501
Telephone: (208) 743-5299 • Facsimile: (208) 743-7432


CIVIL COMPLAINT

EXHIBIT -B

23

Everest National Insurance Company
1111 Broadway, Suite 2050
Oakland CA 94607-4011
Tel: 510.273.4660
Direct: 510.273.4690
Fax: 510.267.0751

RECEIVED
2008 DEC 16 AM 11:54
STATE OF IDAHO
DEPT OF INSURANCE


EVEREST

December 15, 2008

Amy Lambrecht
Consumer Affairs Officer
Idaho Department of Insurance
700 West State Street, 3rd Floor
Boise, Idaho 83720-0043

RE: Claimant: Robert J. McCormack
Insured: Valley Concrete
File No.: 1001060
Claim No. 2836-1208
NAIC Code: 10120

Dear Ms. Lambrecht:

This is in response to the complaint filed by the above-captioned claimant, Robert J. McCormack.

Response to Question 1:

Mr. McCormack is not a named insured on the applicable Workers' Compensation policy. Mr. McCormack was provided with statutory Workers' Compensation benefits in accordance with the terms of the policy and Title 72 of the Idaho Code.

Response to Question 2:

A spreadsheet was prepared and is attached hereto (Attachment 1) which lists all payments made on Mr. McCormack's claim. The spreadsheet is based on the computerized payment record for this claim and includes the requested criteria: Payee, Benefit Type, Payment Period, Amount and Address to which the check was sent.

Response to Question 3:

a) Some Disability benefit payments were issued to Mr. McCormack but sent in care of his attorney, at the attorney's request. Sending disability payments to a party other than the claimant is unusual, but is done on an exception basis and upon written request by the claimant or, as in this case, an authorized representative of the claimant (See Attachment 2). It was believed by the Claims Examiner that the request was made because Mr. McCormack was or would soon be incarcerated.

b) Disability and Medical benefit payments were terminated as of May 30, 2002 in accordance with the medical record and an order issued by the Industrial Commission

**Indemnity Payments Issued to
Claimant c/o third party**

EXHIBIT-C

INMATE COPY

IDAHO DEPARTMENT OF CORRECTION OFFICIAL TIME CALCULATION REPORT

COMMITMENT NAME: MCCORMACK, ROBERT J
LAST DATE CALCULATED: 06/02/2008 SEX: M

IDOC NUMBER: 32935
PAGE: 1 OF 1

CASE NUMBERS	CR02-01274	CR06-4227
SENTENCE NUMBER	2	3
COUNTY	NEZ PERCE	NEZ PERCE
CRIME	DRIV INFLNCE	SUBST DEL
COUNTS (IDENTICAL TERMS)	1	1
DATE OF CRIME	04 13 2002	03.22.2006
MINIMUM SENTENCE	1- 0- 0	2- 6- 0
MAXIMUM SENTENCE	4- 0- 0	7- 0- 0
DATE OF SENTENCE	07/10/2003	10/25/2006
SENTENCE EFFECTIVE DATE		
CC/CS TO SENTENCE	I	CC 2
INDETERMINATE BEGIN DATE	07/07/2004	11/16/2008

JURISDICTION BEGINS
JURISDICTION ENDS
JURISDICTION QUASHED

JAIL CREDITS	3	160
PAROLE FORFEITS	618	
PAROLE ELIGIBLE	07/07/2004	11/16/2008
FULL TERM EXPIRATION	03/15/2009	05/15/2013

CC = Concurrent, CS = Consecutive, CL = Consecutive to All

REMARKS:

GENERAL 5-6-08 PR AUDIT CK
SENTENCE 2 07-14-03RS.DC./10-21-03 PR AUDIT CK/12.12.06 PR
REVOKED+01.09.07CD.CK, REV.SVA<1DAY
SENTENCE 3 10.30.06CD.RS/05-05-08 CREDIT ORDER +06-02-08CM.

STATUS PERIODS:

START	LENGTH	TYPE
12/12/2006	538	PAROLE REVOKED
10/31/2006	42	Present at Facility
09/08/2004	783	RELEASE DATE
07/11/2003	425	Present at Facility
07/10/2003	1	SENTENCE DATE

EXHIBIT C COMPLAINT

State of Idaho
DEPARTMENT OF INSURANCE

C.L. "BUTCH" OTTER
Governor

700 West State Street, 3rd Floor
P.O. Box 83720
Boise, Idaho 83720-0043
Phone (208)334-4250
FAX # (208)334-4398

WILLIAM W. DEAL
Director

February 2, 2009

Robert J. McCormack
PO Box 8509 ND A29
SICI
Boise ID 83707

RE: Department File Number: 1001060
Insurance Company: Everest National Insurance Company
Claim Number: 2836-1208

Dear Mr. McCormack:

Enclosed is correspondence received from Everest National Insurance Company in response to your complaint regarding your workers compensation claim.

Everest National Insurance Company has provided an explanation of how they handled your workers compensation claim. The insurer has provided a summary of all payments made for your claim and copies of most of the checks issued to you and to you in care of your attorney. It was not possible to obtain copies of all of the checks issued to you because the checks were issued over five years ago in 2001 and 2002.

We have reviewed the insurer's handling of this claim and found no violations of Idaho Insurance Code. Although we understand it is possible that your name was forged on some of the checks sent in care of your attorney, we are unable to pursue investigating any potential signature forgeries because the statute of limitations was five years.

As stated in my 12/01/08 letter to you, the Idaho Department of Insurance does not have the jurisdiction to investigate your attorney's handling of this matter. If you wish to pursue your attorney's handling of this matter, we suggest you contact the Idaho State Bar at:

PO Box 895
Boise, ID 83701

We appreciate your patience in this matter. It took longer than anticipated to obtain copies of the cancelled checks. If I can be of further assistance to you, please contact me by 02/23/09. If I do not hear from you by that date, I will close the file.

Sincerely,

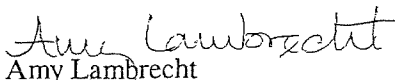

Amy Lambrecht
Consumer Affairs Officer
Idaho Department of Insurance
(208)334-4322
E-mail: amy.lambrecht@doi.idaho.gov

EXHIBIT - G
CIVIL COMPLAINT

40

Richard Whitehead
admitted in Idaho, Washington, and Montana
Certified Workers' Compensation Specialist
Thomas B. Amberson
admitted in Idaho and Oregon
Christopher Caldwell
admitted in Idaho and Washington



Whitehead, Amberson & Caldwell, PLLC
ATTORNEYS AT LAW

Offices in Coeur d'Alene
and Lewiston

December 16, 2002

Update Request

Patient Records\Accounts
Ni Mee Poo Health
PO Drawer 367
Lapwai ID 83540

Re: Patient/Client : Robert J. McCormack
D.O.B. :
D.O.I. : 04/09/01

Dear Madam or Sir:

As you know this firm has been retained to represent Robert J. McCormack for injuries he sustained as the result of a industrial injury. You should also be advised that this case is covered under the Idaho Workers' Compensation Law; therefore, Claimant is entitled to the first copy of such records at no cost to Claimant or the requesting party.

At this time I would like to request that you provide to me complete copies of the following information as of January 1, 2002 to present:

1. The complete medical file to include chart notes (if any), x-ray interpretations, bone scans, neurological workups, CAT and MRI interpretations, psychological treatment, surgery notes and all correspondence relating to the care you have provided prior to and subsequent to our client's injuries.
2. A listing by date of any prescriptions prescribed (if any).
3. An itemized statement setting forth all charges, payments and balances on the account to date.

am enclosing a copy of a medical authorization for your information and file.

Thank you in advance for your assistance in this matter.

WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.,

Ronda K. Nichols
Workers' Compensation Paralegal

Enclosure: Medical Release

EXHIBIT A
COMPLAINT

2230 N. 3rd Avenue • Lewiston, Idaho 83501
Mail - P. O. Box 607 • Lewiston, Idaho 83501-0607
(208) 743-5299 • FAX (208) 743-7432

RECEIVED

DEC 17 2002

Reception/Mailroom

41

1512

Uesta mae

called Ronda
have these
waiting
12-27-02

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. McCORMACK,

Claimant,

v.

ALL VALLEY CONCRETE,

Employer,

and

EVEREST NATIONAL
INSURANCE COMPANY,

Surety,
Defendants.

IC 01-011245

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

FILED

JUL 27 2006

INDUSTRIAL COMMISSION

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Lewiston, Idaho, on January 19, 2006. Christopher Caldwell represented Claimant. Glenna M. Christensen represented Defendants. The parties took post-hearing depositions and submitted briefs. The case came under advisement on June 12, 2006, and is now ready for decision.

ISSUES

After due notice and by subsequent agreement of the parties, the issues are as follows:

Whether and to what extent Claimant is entitled to the following benefits:

1. temporary disability (TTD);
2. permanent partial impairment (PPI);
3. disability in excess of impairment;
4. medical care; and
5. retraining.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1

EXHIBIT - 1.1
CIVIL COMPLAINT

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PPI rated at 6% of the whole person attributable to the industrial accident.

36. **Permanent Disability.** Permanent disability is defined and evaluated according to statute. Idaho Code §§ 72-423, 424, 425, 430(1). Some factors are expressly defined by statute and other unexpressed factors may be considered. Idaho Code § 72-430(1). Here, Claimant retained a vocational expert at the 11th hour to generate a disability analysis. Essentially, Ms. Uhlenkott assumed an equal 20% of jobs exist for each exertional level, and determined Claimant was unable to perform three and one-half exertional levels. Her analysis is not supported by the evidence. It appears she simply was not given adequate time to perform a credible analysis.

37. Further, the record shows Claimant made meager attempts to cooperate with physical therapy and with vocational counselors at a time when it could have done him the most good. When Ms. Uhlenkott cited Claimant's protracted absence from the labor market as a factor in her disability analysis, she ignored the fact that he declined to cooperate in attempts to return him to the labor market. Additionally, Claimant retains the network for employment upon which he has relied for his entire adult life – TERO.

38. Claimant showed he suffers some permanent disability in excess of impairment. He has medical restrictions and Dr. Colburn has disapproved some jobs and expressed reservations about others. However, considering all factors, including Claimant's age, education, local labor market, medical and other non-medical factors, Claimant failed to show he suffers significant permanent disability related to the accident. Permanent disability was not established above 15% inclusive of PPI.

39. **Retraining.** Claimant's recent interest and attempt at re-establishing his life are commendable. However, Claimant failed to show the HVAC program is a realistic retraining for him. He failed to cooperate with ICRD when other retraining programs were suggested.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 9

Debra J. Uhlenkott, M.Ed., CRC

Vocational Rehabilitation Counselor & Consultant

500 Sycamore Building
Clarkston, Washington 99403
(888)758 - 3517
(509)758 - 3517 (fax)

(email) voc-rehab@clearwire.net

September 7, 2006

Robert McCormack
Offender #32935 Housing Unit 15-A 01-A
Idaho State Correctional Institution
P.O. Box 14
Boise ID 83701

Dear Robert:

I am sorry to hear about your legal troubles. I hope that upon your release, you can find satisfying work.

As far as my evaluation, I was shocked to hear that the referee felt I did not have sufficient time to formulate an opinion. He never asked me if I felt I had enough time to formulate an opinion or perform a sufficient analysis. Instead, he reached this conclusion on his own without ever asking me if this was in fact the case. I believe the facts well support my opinions and conclusions, which are essentially, that you lost the ability to perform at least 70% of your pre-injury labor market, that is, the jobs that you could do before your back injury. I would not have taken your case for opinion, if I felt I did not have enough time to formulate a proper analysis and opinion.

As far as recommendations, I suggest you contact either the Nezperce Tribe or the State of Idaho Division of Vocational Rehabilitation upon your release from prison, and apply for retraining. The State of Idaho Division of Vocational Rehabilitation has offices all over the state, including in Boise. They even have offices that work exclusively with parolees and probationers. I am attaching some information about the DVR offices and programs.

I do not think that HVAC is appropriate, based upon your restrictions, but some lighter duty work would be appropriate. You may want to explore your options with DVR or the Nezperce Tribe as they can administer some interest and aptitude tests to help you determine the best jobs for you within your physical and mental abilities and interests.

I wish you all the best of luck, Robert, upon your release. I hope you are able to find the strength to overcome your frustrations, and that you will again find a job you enjoy that allows you to support yourself.

Sincerely,



Debra J. Uhlenkott, M.Ed., CRC
VR Consultant

CC Christopher Caldwell, Attorney at Law

EXHIBIT - I.3

CIVIL COMPLAINT

44



Richard Whitehead

*admitted in Idaho, Washington, and Montana
Certified Workers' Compensation Specialist*

Thomas B. Amberson

admitted in Idaho and Oregon

Christopher Caldwell

*admitted in Idaho and Washington***Whitehead, Amberson & Caldwell, PLLC**
ATTORNEYS AT LAWOffices in Coeur d'Alene
and LewistonVia Facsimile: Hard Copy to Follow Via U.S. Mail
August 20, 2001Leslee L. Haylett
Crawford & Company
146 South Cole Road
Boise, ID 83709

RE: Claim #: 171-64501
Claimant: Robert McCormick
Employer: All Valley Concrete
DOI: 4/9/01

Dear Ms. Haylett:

This letter is to advise you that this firm has been retained to represent Mr. McCormick with regard to the above-referenced injury. Please forward all correspondence and communication to my office.

We would request that payment be made of total temporary disability benefits based upon his ongoing treatment. As you know, it is difficult for claimants to survive while paperwork issues are dealt with. It is clear that Mr. McCormick suffers serious injuries.

Additionally, we would request approval of the referral to a neurologist by Dr. Hansen. It appears that the referral is being denied because of either 1) disagreement with Dr. Hansen about whether the condition is related, or 2) failure to request of Dr. Hansen an opinion about whether the condition is related. If the first scenario is the basis, it is a conclusion that has been reached with no medical basis, and is, therefore, invalid. If the second scenario is the basis, then it is Crawford & Co.'s job to request the opinion.

As you might imagine, the treatment requested by Mr. McCormick is important. Please help us understand the precise basis for the denial by providing us the detailed explanation in

2230 3rd Ave. N. ♦ P.O. Box 607
Lewiston, Idaho ♦ 83501
Telephone: (208) 743-5299
Facsimile: (208) 743-7432

RECEIVED
AUG 22 2001
CRAWFORD & CO.

EXHIBIT - J
CIVIL COMPLAINT

45

Richard Whitehead
admitted in Idaho, Washington, and Montana
Certified Workers' Compensation Specialist
Thomas R. Amberson
admitted in Idaho and Oregon

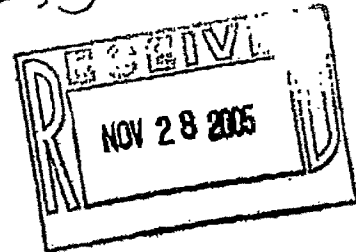


Whitehead, Amberson & Caldwell, P.L.L.C.

ATTORNEYS AT LAW

Christopher Caldwell
admitted in Idaho and Washington
Michael Kessinger
admitted in Idaho

November 23, 2005



Lewiston Orthopaedic Associates
ATTN: Dr. Dietrich
320 Warner Drive
Lewiston, ID 83501

Re: Patient/Client : Robert J. McCormack
D.O.B. :
D.O.I. : 04/09/01

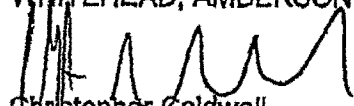
Dear Dr. Dietrich:

As you know, I have been retained by Mr. McCormack to represent his interest with regard to an industrial accident of April 9, 2001. I am enclosing for your review an independent medical examination performed by Dr. Colburn on May 30, 2002. You will note that at that time, surgery was being considered to treat Mr. McCormack's industrial injury, however, Dr. Colburn had several concerns including alcoholism. Since that time, it is my understanding that Mr. McCormack has addressed issues surrounding alcohol abuse and no longer drinks. We are asking for your opinions with regard to the following, each to a reasonable degree of medical probability on a more likely than not basis:

1. What injury do you believe Mr. McCormack sustained as a result of his April 9, 2001, industrial injury? *Disc herniation, Annular tear L4/5*
2. Does Mr. McCormack require additional reasonable and necessary medical care as a result of his April 9, 2001, industrial accident? *YES*
3. If your answer to Question No. 2 is yes, please advise of what medical care is reasonable and necessary to treat injuries sustained by Mr. McCormack as a result of the April 9, 2001, industrial accident.
may @ some point require surgery, but hopefully not
4. Please address any other comments or concerns you have regarding this matter.

On behalf of Mr. McCormack and myself, I would like to thank you for your anticipated cooperation in answering these questions.

WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.,


Christopher Caldwell
Attorney at Law

Enclosure: Dr. Colburn IME

2230 3rd Avenue North • Lewiston, Idaho 83501
Mail - Post Office Box 607 • Lewiston, Idaho 83501
Telephone: 208.743.6299 • Facsimile: 208.743.7432

Offices in Coeur d'Alene and Lewiston

EXHIBIT - K

CIVIL COMPLAINT

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000737

AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS

To: Medical Records Librarian

I HEREBY AUTHORIZE AND REQUEST any physician, hospital, laboratory, health care provider or association to disclose to the law firm of Whitehead, Amberson & Caldwell, P.L.L.C., P.O. Box 607, 2230 Third Avenue North, Lewiston, Idaho 83501, a complete written copy of all my medical records, including, but not limited to, reports, correspondence, memoranda, billings, examination and test results and x-rays, and any and all records pertaining to my medical care, including hospitalization, history, condition, treatment, diagnosis and prognosis for any care provided by said provider at any time.

This Authorization for Release of Medical Records shall entitle said law firm to obtain information orally from said medical provider.

You are also authorized to allow these attorneys to inspect and take a copy of your clinical or hospital records of me, and to inspect and borrow x-rays or photographs in your possession for examination.

I understand that my express consent is required for the release of information relating to sexually transmitted disease, mental illness or diagnosed in connection with any sexually transmitted disease, or drug/alcohol abuse, and/or mental illness, and you are specifically authorized to release to said law firm all information or medical records relating to such diagnosis, testing or treatment, in written form.

Photocopies of this authorization will be considered as valid as the original.

This Authorization shall remain in full force and effect until revoked by the undersigned in writing.

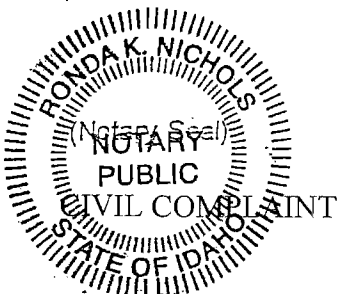
DATED this 16th day of December, 2002

[Redacted]
Social Security Number

[Signature]
Signature

Robert J. McCormack
Printed Name

SUBSCRIBED AND SWORN to before me this 16th day of December, 2002



Ronda K. Nichols
NOTARY PUBLIC
Residing at: Julietta, ID
Commission Expires: 5-14-05

47

RICHARD WHITEHEAD ISB #2851
WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.
2230 3rd. Ave. N.
P.O. Box 607
Lewiston, ID 83501
Telephone: (208) 743-5299
Facsimile: (208) 743-7432

FILED
2009 AUG 28 PM 12 17

PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendant

CASE NO. CV2009-1218

MOTION TO DISMISS
PURSUANT TO IRCP
RULE 12(b)(6)

COMES NOW, the Defendants and hereby moves this Court for an Order
dismissing the above-entitled claims of Plaintiff pursuant to IRCP Rule 12(b)(6).
Plaintiff's Complaint fails to state a claim upon which relief can be granted.

This Motion is based upon the following:

- A. Affidavit of Ronda Nichols;
- B. Affidavit of Christopher Caldwell
- C. Memorandum in Support of Defendants' Motion to Dismiss pursuant to
IRCP Rule 12(b)(6).

ORIGINAL

ORAL ARGUMENT IS REQUESTED

DATED THIS 26 day of August, 2009.

A handwritten signature in black ink, appearing to read "Richard Whitehead for".

RICHARD WHITEHEAD ISB 2851
Attorney for Defendants

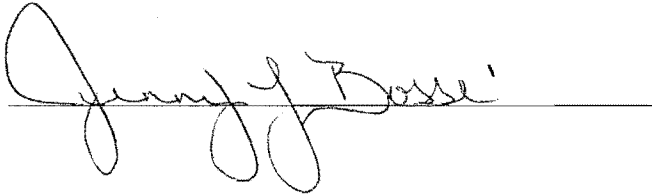
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, by the undersigned this 28th day of August, 2009, to:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

And

DeWayne Shedd
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

A handwritten signature in cursive script, appearing to read "Jenny J. Bosse", is written over a horizontal line.

RICHARD WHITEHEAD ISB #2851
WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.
2230 3rd. Ave. N.
P.O. Box 607
Lewiston, ID 83501
Telephone: (208) 743-5299
Facsimile: (208) 743-7432

FILED

2009 AUG 28 PM 12 17

PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendant

CASE NO. CV2009-1218

AFFIDAVIT OF CHRISTOPHER
CALDWELL IN SUPPORT OF
DEFENDANTS' MOTION
TO DISMISS PURSUANT TO
IRCP RULE 12(b)(6)

STATE OF IDAHO)

)ss.

County of Nez Perce)

YOUR AFFIANT, having first been duly sworn, states as follows:

1. That Affiant is and all times relevant to this Affiant an attorney at law duly licensed to practice law by the State of Idaho, am over the age of eighteen, of sound mind and have personal knowledge of the following:

2. That on August 20, 2001, your Affiant was retained as an attorney at law to represent said Plaintiff Robert James McCormack with regard to an industrial accident

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS' 1
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

ORIGINAL

51

with resultant personal injury arising on or about April 9, 2001.

3. Plaintiff retained your Affiant pursuant to a written attorney-client contract solely for attorney representation for said industrial accident and for no other representation.

4. A true and correct copy of said written attorney-client contract is attached hereto and made a part of his Affidavit by Reference as Exhibit '1.'

5. On page 2 of Exhibit 1, your Affiant added "no fees from uncontested benefits" prior to review of the contract and signature on the contract by Plaintiff. It is your Affiant's habit and practice to add this to written contracts in workers compensation matters when clients are receiving ongoing workers compensation benefits. Your Affiant wrote this on Exhibit '1' because at the time that your Affiant was retained by Plaintiff, Plaintiff advised your Affiant that he was receiving ongoing workers compensation payments from the surety.

6. That your Affiant diligently represented Plaintiff in front of the Idaho Industrial Commission with regard to his claims for benefits associated with the April 9, 2001, industrial accident. Your Affiant timely filed a complaint on Plaintiff's behalf, timely conducted discovery, timely retained expert witnesses including Vocational Counselor Deb Uhlenkott, neurosurgeon Bret Dirks and orthopaedist Robert Colburn, and ultimately tried the case to a referee from the Idaho Industrial Commission. Said hearing occurred on January 19, 2006. At the hearing and in post-hearing deposition pursuant to the applicable rules of the Judicial Rules of Practice and Procedure, your Affiant and attorney Michael Kessinger diligently examined various witnesses on behalf of Plaintiff,

including Plaintiff, Vocational Consultant Deb Uhlenkott, neurosurgeon Bret Dirks, and

orthopaedist Robert Colburn. On July 27, 2006, the Idaho Industrial Commission adopted by Order the Findings of Fact, Conclusions of Law, and Recommendation authored by the Referee who presided over the matter. Attached hereto and made a part of this Affidavit by Reference as Exhibit '2' is a true and correct copy of the Order and Findings of Fact, Conclusions of Law, and Recommendation.

7. That your Affiant caused to be delivered to Plaintiff a letter dated August 2, 2006, via US Mail, postage pre-paid, with the decision of the Idaho Industrial Commission (attached hereto as Exhibit '2') enclosed therein. A true and correct copy of said letter is attached hereto as Exhibit 3, and made a part of this Affidavit by Reference.

8. On August 15, 2006, your Affiant discussed with Plaintiff on the telephone the results of the hearing and, in particular, the written decision and findings of the Industrial Commission. At that time, Plaintiff was incarcerated. Plaintiff advised that he had received and reviewed the written decision of the Idaho Industrial Commission and felt that the something was wrong with the decision. At that time, he requested the addresses of expert witnesses Deborah Uhlencott and Robert Colburn, MD. At that time, your Affiant advised that a Motion to Reconsider would be filed on Plaintiff's behalf.

9. On August 15, 2006, your Affiant timely filed on Plaintiff's behalf a Motion to Reconsider the Industrial Commission's decision dated July 27, 2006. On September 26, 2006, the Industrial Commission affirmed its original decision and denied the Motion to Reconsider. Attached hereto and made a part of this Affidavit by Reference as Exhibit '4' is a true and correct copy of the Order Denying Reconsideration.

10. On October 2, 2006, your Affiant filed with the Industrial Commission a
Motion seeking approval of a charging lien for attorney fees and costs. On December 1,

2006, your Affiant was awarded 30% of the award to Plaintiff as payment of attorney fees, along with \$2,924.95 in litigation costs. Attached hereto and made a part of this Affidavit by Reference as Exhibit '5' is a true and correct copy of the Order Approving Attorney Lien.

11. On September 29, 2006, your Affiant filed a Motion to Withdraw as Plaintiff's attorney with the Industrial Commission. On December 7, 2006, the Industrial Commission granted the Motion allowing your Affiant to withdraw as Plaintiff's attorney. A true and correct copy the Order Allowing Withdrawal of Attorney of Record along with the Affidavit of Christopher Caldwell is attached hereto and made a part of this Affidavit by Reference as Exhibit '6.'

12. On February 5, 2007, the Industrial Commission issued an Order on Pending Motions. Within said Order, the Industrial Commission found that your Affiant was allowed to withdraw as Plaintiff's attorney on December 11, 2006, and that Plaintiff was representing himself as of December 20, 2006 in the underlying workers compensation claim arising from Plaintiff's April 9, 2001, industrial accident. The Order further found that Claimant had personally requested information from the Idaho Industrial Commission regarding an appeal on December 26, 2006. A true and correct copy the Order on Pending Motions is attached hereto and made a part of this Affidavit by Reference as Exhibit '7.'

11. That on December 8, 2006, the Idaho Industrial Commission delivered to your Affiant via U.S. Mail, postage pre-paid, a copy of a letter authored by Plaintiff and filed with the Idaho Industrial Commission on December 6, 2006. A true and correct copy of this filing is attached hereto and made a part of this Affidavit by reference as

Exhibit '8.'

12. That attached hereto and made a part of this Affidavit by reference as Exhibit '9' is a true and correct printout of the unemployment compensation benefit payment history for Plaintiff detailing Plaintiff's receipt of unemployment compensation from March 2, 2002, through August 31, 2002.

13. That attached hereto and made a part of the Affidavit by reference as Exhibit '10' is a true and correct copy of the Affidavit of Robert McCormack in Support of Motion for Malpractice dated and notarized February 8, 2008.

14. That your Affiant had no attorney-client relationship with Plaintiff after December 11, 2006.

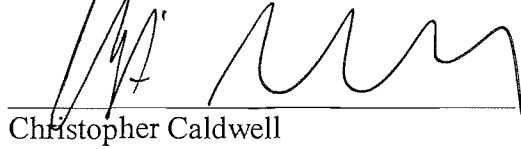
15. That your affiant has practiced law within the City of Lewiston, County of Nez Perce, State of Idaho since 1996, has handled hundreds of Idaho workers compensation cases, is familiar with the standard of care owed to clients by duly licensed attorneys in Idaho during the periods of 1996 until the present time. You Affiant is familiar with the facts of Plaintiff's workers compensation case arising from his industrial injury of April 9, 2001, having participated in the case and having reviewed the legal file. Defendants did not violate the standard of care owed to Plaintiff during the course of representation of Plaintiff with regard to his April 9, 2001, industrial accident. At all times in the handling of Plaintiff's workers compensation claim, Defendants were in compliance with the applicable standard of care owed to Plaintiff.

16. During the course of representation of Plaintiff, your Affiant scheduled an Independent Medical Examination with Dr. Colburn for May 2, 2002. However, Dr.

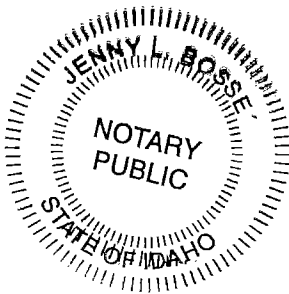
Colburn cancelled that Examination and re-scheduled it for May 30, 2002, because

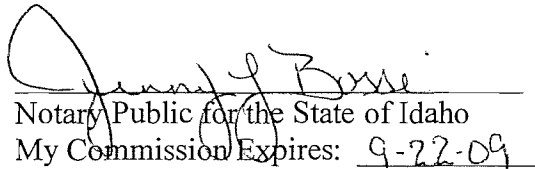
Plaintiff arrived to the examination so intoxicated that Dr. Colburn was unable to complete the exam.

17. Further your Affiant saith naught.


Christopher Caldwell

Subscribed and sworn to before me this 27th day of August, 2009.




Notary Public for the State of Idaho
My Commission Expires: 9-22-09

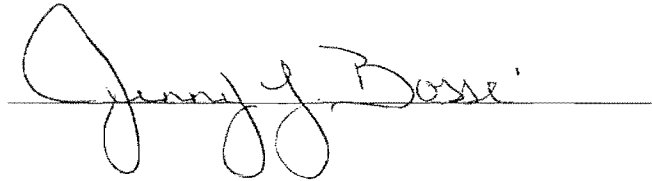
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, by the undersigned this 28th day of August, 2009, to:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

And

DeWayne Shedd
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

A handwritten signature in cursive script, reading "Jenny J. Bosse", is written over a horizontal line.

ATTORNEY/CLIENT CONTRACT
WORKERS COMPENSATION

On this 20 day of August, 2001, the Client(s), Robert McCormack, does hereby retain and appoint the Law Firm of Whitehead, Amberson & Caldwell P.L.L.C. to represent said Client(s) against employer and surety, arising out of an industrial accident or occupational disease which occurred on or about 4-9-01, on the following conditions:

RESPONSIBILITIES

1. Attorney(s) will devote their full professional abilities to Client's case and Client agrees to cooperate fully with Attorney.

AMOUNT OF FEES BASED ON GROSS RECOVERY

2. Client agrees to pay attorney fees for services as follows:

(A) 25 percent of any and all monies whatsoever recovered, including disputed medical benefits and subrogation recovery, from said claim by settlement prior to commencement of hearing of said claim by the Idaho Industrial Commission.

(B) 30 percent of any and all monies whatsoever recovered, including disputed medical benefits, subrogation recovery, and any award of attorney fees and costs, from said claim by settlement or otherwise, after commencement of hearing of said claim by the Idaho Industrial Commission.

(C) 40 percent of any and all monies whatsoever recovered, including disputed medical benefits, subrogation recovery, and any award of attorney fees and costs, if any appeal of said claim is filed.

(D) In the event of a structured settlement, attorney's fees shall be computed based upon the present value of the entire settlement and shall be paid in full at the time of settlement, or at Attorney's sole discretion, fees shall be paid from any payment of the structured settlement at the applicable rate set forth in paragraph 2 above.

In the event there should be no recovery, Client shall not owe Attorney a fee for services rendered.

CLIENT RESPONSIBLE FOR COSTS

3. Regardless of outcome, Client agrees to pay all out-of-pocket expenses incurred in the preparation of the case, including but not limited to:

Cost for Medical Records
Investigation
Lay and Expert Witness Fees
Photocopying of Documents

Travel Expenses
Depositions
Long Distance Phone Calls
Postage

Client understands that Attorney may advance costs incurred in the pursuit of this matter as he believes necessary. Client understands that, upon request, Attorney shall submit to Client in the first calendar week of each month an itemized listing of costs advanced to date. Client agrees to pay interest at the rate of 1 percent per month (12% per annum) on outstanding balances of any costs advanced by Attorney on Client's behalf and not paid by Client during the month of the advance.

Client authorizes Attorney to deduct such out-of-pocket expenses and the agreed upon Attorney's Fees from any amounts recovered.

Client authorizes Attorney to deduct from Client's share of the proceeds any charges which may remain outstanding for any doctor, hospital, expert or maintenance of the Client as a result of this injury.

FURTHER TERMS

- No fees from uncontested benefits -

NO GUARANTEES

4. Client agrees that Attorney has made no promise nor guarantees regarding the outcome of Client's claim. Client understands that Attorney shall have the right to cancel this contract at any time, and in such event Client shall not be obligated to pay any out-of-pocket costs incurred by Attorney in preparing the case.

DISCHARGE OF ATTORNEY

5. In the event of the discharge of the Attorney by the Client before completion of this matter, the Client agrees to pay Attorney, at Attorney's option, either:

(a) for the time Attorney has spent on behalf of Client at the rate of \$ 125.00 per hour for Attorneys and \$110.00 per hour for Associate Attorneys or

(b) the amount stated in Paragraph 2 above, if recovery on the claim is otherwise obtained by the Client or his/her agent.

Upon such discharge, Client agrees to pay Attorney all out-of-pocket expenses incurred by Attorney, including interest to date at the rate of 1 percent per month or 12 percent annually, and fees before Client's file or other information in possession of Attorney shall be made available to Client or their agent. Client hereby grants to the Law Firm of WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C. an Attorney lien on Client's cause of action to secure these obligations.

I have read this contract and agree to its terms and conditions. There are no other agreements between Client(s) and Attorney except those expressly set forth in this contract.

IN WITNESS WHEREOF, the parties hereto have set their hands the date in this contract first above written.



Client



Attorney

Client

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. McCORMACK,

Claimant,

v.

ALL VALLEY CONCRETE,

Employer,

and

EVEREST NATIONAL
INSURANCE COMPANY,

Surety,
Defendants.

IC 01-011245

ORDER

FILED

JUL 27 2006

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusions of law to the members of the Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant suffered a compensable accident and injury. He is entitled to PPI rated at 6% of the whole person as a result. Defendants are entitled to credit for PPI amounts paid.
2. Claimant failed to show he is entitled to either TTD or medical benefits after May 30, 2002.
3. Claimant showed he is entitled to permanent disability rated at 15%, inclusive of PPI.

ORDER - 1

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

EXHIBIT

61

4. Claimant failed to show he is entitled to an award of retraining benefits.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 27th day of July, 2006.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh
Thomas E. Limbaugh, Chairman

James F. Kile
James F. Kile, Commissioner

R. D. Maynard
R. D. Maynard, Commissioner

ATTEST:

Dana K. Burke
Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on 27th day of July, 2006, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

Christopher Caldwell
P.O. Box 607
Lewiston, ID 83501

Glenna M. Christensen
P.O. Box 829
Boise, ID 83701

db

Dana K. Burke

ORDER - 2

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

62

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. McCORMACK,

Claimant,

v.

ALL VALLEY CONCRETE,

Employer,

and

EVEREST NATIONAL
INSURANCE COMPANY,

Surety,
Defendants.

IC 01-011245

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

FILED

JUL 27 2006

INDUSTRIAL COMMISSION

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Lewiston, Idaho, on January 19, 2006. Christopher Caldwell represented Claimant. Glenna M. Christensen represented Defendants. The parties took post-hearing depositions and submitted briefs. The case came under advisement on June 12, 2006, and is now ready for decision.

ISSUES

After due notice and by subsequent agreement of the parties, the issues are as follows:

Whether and to what extent Claimant is entitled to the following benefits:

1. temporary disability (TTD);
2. permanent partial impairment (PPI);
3. disability in excess of impairment;
4. medical care; and
5. retraining.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

63

CONTENTIONS OF THE PARTIES

Claimant contends he suffered injury to his lumbar spine when he was struck by a large bucket of concrete on April 9, 2001. He is not yet stable and requires surgery – artificial disc replacement at two levels, L3-4 and L4-5, or, in the alternative, lumbar fusion. He remains temporarily totally disabled until he becomes medically stable. If found stable, he suffers 6% permanent impairment and permanent disability which reaches 70%. He is entitled to benefits for medical care after April 10, 2002, the date of the independent medical evaluation upon which Surety discontinued benefits. Claimant is entitled to future medical benefits including a two-level artificial disc replacement whenever that procedure is approved by the FDA. Claimant is entitled to benefits for retraining and is studying to work in the heating and air conditioning industry.

Defendants contend Claimant was declared stable following IMEs by Dr. Sears on December 4, 2001 and April 10, 2002, and by Dr. Colburn on May 30, 2002. Dr. Colburn performed an IME at Claimant's request. Medical benefits and TTDs were appropriately discontinued upon the opinions of these doctors. Claimant's request for a two-level artificial disc replacement cannot reasonably be considered because the procedure is not available in the United States. Defendants do not dispute the 6% PPI rating stated by Dr. Colburn. Claimant's permanent disability is substantially less than 70%. Finally, while Claimant might benefit from an appropriate retraining program, he has failed to identify one which would yield a job within the restrictions described by Dr. Colburn.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, and vocational rehabilitation consultant Deb Uhlenkott;

2. Claimant's exhibits 1-35 and Defendants' exhibits A-E; and
3. Post-hearing depositions of orthopaedist Robert C. Colburn, M.D., and neurosurgeon Bret A. Dirks, M.D.

FINDINGS OF FACT

1. Claimant is an enrolled member of the Colville tribe of the Nez Perce nation. For most of his adult life he has worked various jobs obtained through the Tribal Employment Rights Office (TERO). On April 9, 2001, he was employed by Employer working a construction project and pouring concrete. He was bent over screeding freshly poured concrete when a bucket of concrete, weighing perhaps 2000 pounds, struck him in the flank and knocked him over. (Screeding is performed by dragging a board across the surface of the wet concrete to make sure its level.) Claimant was not immediately aware of any injury and continued working. He noticed gradually increasing pain throughout the day.

2. Claimant first sought medical attention on April 13, 2001. He visited the Nimiipoo Health Clinic. By preference, he more often saw Roberta Carr, PA-C, but was treated by whomever among the various physicians was available at the time. (Sometimes the record obliterates the physicians' signatures or they are otherwise illegible.) Claimant was diagnosed with left flank pain. He next visited on April 23, 2001 and was similarly diagnosed.

3. Claimant's pain source migrated inexplicably. Indeed, at hearing, he described being struck in the back, near the spine, rather than on either flank.

4. On April 30, 2001, he visited Nimiipoo Health and was diagnosed with *right* flank pain. Physical therapy was prescribed and after several missed appointments and rescheduling attempts, Claimant actually attended 4 physical therapy sessions.

5. On May 24, 2001, Claimant visited Nimiipoo Health complaining of thoracic spine pain. On May 25, 2001, he again appeared requesting a "work excuse for insurance"

purposes. He again reverted to his claim of right flank pain, but included a new complaint of headaches.

6. On June 5, 2001, Claimant underwent T-spine x-rays which showed small disc protrusions at T7-8 and T8-9 "of no clinical significance." On June 11, 2001, Claimant underwent a CT scan of his brain which showed no abnormalities.

7. On June 21, 2001, orthopaedist Regan Hansen, M.D., examined Claimant and ordered lumbar x-rays which showed some degenerative spurring at L5 but were otherwise normal.

8. On June 25, 2001, a cryptic Nimiipoo Health note records, "LW[null symbol]BS." This note is not explained in the record or by resort to *Stedman's Medical Dictionary*, 28th ed.

9. On July 22, 2001, a lumbar MRI showed a medium sized herniated disc at L4-5, a moderate sized bulging disc on the left at L3-4, and showed the lumbar spine as otherwise normal.

10. On July 30, 2001, Dr. Hansen interpreted the MRI as showing bulging discs "with no obvious neurologic impingement. It does appear to be degenerative with loss of water." He continued, "There is no surgical treatment. I would refer him back to his primary care physician, as well as a referral to a neurologist for evaluation of his headaches."

11. The following day, on July 31, 2001, Nimiipoo Health recorded Claimant's first complaint of low back pain since the date of the accident. The physician speculated Claimant's headaches may be related to the medication he was receiving for his back complaints.

12. On September 10, 2001, Dr. Hansen released Claimant to light duty and imposed temporary restrictions for the next two months.

13. On September 25, 2001, neurologist Jean Thomas, M.D., evaluated Claimant's

complaints of headache and low back pain, and expressed concern about the interaction of Claimant's medications with his alcohol intake.

14. Between November 2001 and March 2002, Claimant attended 12 physical therapy sessions.

15. On February 7, 2002, neurologist William Bozarth, M.D., conducted an electromyogram and nerve conduction velocity study (EMG/NCV) on Claimant. It showed mild slowing associated with the S1 nerve root.

16. On January 14 and February 18, 2002, neurologist William Hill, M.D., examined Claimant. He recommended a restriction of no lifting over 35 pounds and expressed a willingness to consider surgical discectomy if symptoms worsened. At this point, Claimant was complaining of constant low back pain, headaches, and numbness in the first three toes of his left foot.

17. ICRD consultant Lynette Schlader began working with Claimant on February 21, 2002. As Employer was no longer in business, she considered potential retraining including heavy equipment operator, fisheries worker, and auto mechanic programs. Claimant completed flagger training in August 2002. On November 4, 2002, Ms. Schlader recorded, "He states that he is unable to work on his retraining with VR (Nez Perce Vocational Rehabilitation) or finding a job because of his pain level." On December 12, 2002, she closed her file noting, "Based on medical reports, the claimant is stable and capable of working. Services of ICRD have been offered but the claimant believes he is not employable at this time." Similarly, VR closed its file in 2002 asserting Claimant failed to cooperate with attempts to retrain Claimant or return him to work. During most of this time, March through August, Claimant was receiving unemployment benefits.

18. On December 4, 2001, and April 10, 2002, Stephen Sears, M.D., evaluated

Claimant at Surety's request. On both occasions, he found Claimant medically stable without permanent impairment. He did provide temporary restrictions to last 2 months after each visit. He stated, "[S]urgery is certainly not indicated."

19. On May 30, 2002, orthopaedist Robert C. Colburn, M.D., evaluated Claimant at Claimant's request. He found Claimant medically stable with a 6% PPI related to the industrial accident. He restricted Claimant to lifting 35 pounds occasionally with motion restrictions. He opined that despite Claimant's prior history of back pain, no apportionment was appropriate. Later, in November, he declined to approve a job site evaluation (JSE) to allow Claimant to return to work as a concrete finisher. He expressed reservation about a JSE for a flagger job because of the standing involved, although his prior restrictions limited sitting to two hours but did not mention any restriction or limitation for standing.

20. Claimant's prior medical history of low back pain consists of entries in or before 1987 in which Claimant described episodic back pain with activity of one year or several years' duration and a lumbar x-ray showing "very minimal" rotoscoliosis at L4.

21. In July and November 2002, Nimiipoo Health noted new accidents. Claimant struck his knee and back in one, and broke a rib in the other.

22. On May 15, 2003, neurologist Bret Dirks, M.D., began treating Claimant. On examination he noted Claimant described diminished sensation in his whole left leg in a nondermatomal pattern and in his right leg in an L5 nerve distribution.

23. On May 23, 2003, a repeat lumbar MRI showed a new disc protrusion at L5-S1 and unchanged disc bulges at L3-4 and L4-5.

24. On November 12, 2004, Gary Haas, D.O., a pain clinic doctor, examined Claimant and reported no objective diagnostic findings but recommended steroid injections and a possible discogram. Ultimately, Claimant refused to complete the discogram, claiming

it was too painful.

25. On December 14, 2004, Dr. Dirks noted, "He certainly seems to be interested in pursuing surgery at this point, as he has failed all nonsurgical therapies."

26. On April 21, 2005, Dr. Dirks noted, "Unfortunately he probably is not a candidate for an artificial disc replacement at this time." Dr. Dirks was considering surgical fusion to be an option. By May 30, 2005, he expressed a willingness to consider a two-level artificial disc replacement "when it becomes available."

27. On May 16, 2005, a lumbar CT scan showed disc bulges at L3-4, L4-5, and L5-S1, all without stenosis or compressive lesions.

28. On September 8, 2005, orthopaedist Gregory Dietrich, M.D., concurred that consideration of an artificial disc replacement was reasonable. However, on November 23, 2005, Dr. Dietrich opined Claimant "may at some point require surgery, but hopefully not."

29. On January 6, 2006, Claimant was evaluated by vocational consultant Deb Uhlenkott. She opined Claimant 70% disabled, but also opined Claimant's HVAC retraining program was inconsistent with his medical restrictions.

30. In depositions, Dr. Dirks opined Claimant's potential for pain relief following surgery was about 50%. Dr. Colburn opined it much less than 50%.

Discussion and Further Findings

31. **Medical Stability and Temporary Disability.** IME physicians chosen by each party independently opined Claimant was medically stable at the time of their evaluations. While it appears clear that Dr. Sears' temporary restrictions were merely a suggestion for gradual return to full work activity, they do tend to undercut the concept of medical stability. Dr. Colburn's date of May 30, 2002 is the appropriate date upon which Claimant should be deemed medically stable. Drs. Dirks and Dietrich did not appear in this matter until more than

a year afterward. The MRIs and Claimant's pre-accident history show Claimant has long had a progressive degenerative condition which continues as shown by the new L5-S1 disc bulge. However, there is not a persuasive opinion or other evidence to suggest that Claimant's degenerative condition was exacerbated or accelerated as a result of the accident. At most, Claimant's degenerative condition predisposed him to suffer the herniated L4-5 disc, which disc herniation was caused by the accident. The MRIs do not show the L4-5 herniation has worsened over time.

32. Claimant is entitled to TTD benefits through May 30, 2002, but not thereafter.

33. **Medical Care.** Claimant is entitled to medical care through May 30, 2002. Subsequent medical care and proposed future medical care has not been shown to be a reasonable response to any injury resulting from the accident. Moreover, Claimant is asking the Commission to approve a procedure that may not yet be legally performed in the United States. Such medical care is unreasonable.

34. Moreover, Dr. Dirks' and Dietrich's opinions about surgery are tepid at best, and based primarily upon Claimant's subjective reports of his current pain and his reported history of pain. The opinions of Drs. Hansen, Sears, and Colburn are nearer in time to the accident and to relevant medical care. Claimant testified that Dr. Dirks or Dietrich assured him he would be pain free after disc replacement surgery. Clearly Claimant misunderstood. The Commission is unaware of any competent medical professional being willing to offer an unequivocal guarantee. Moreover, Dr. Colburn persuasively opined that complicating factors – Claimant's smoking, prior alcohol abuse, and psychological factors – diminish the chance of a successful surgery of any kind.

35. **Permanent Impairment.** Dr. Colburn's 6% PPI rating is accepted by both parties and is not contradicted in its amount by any physician. Claimant is entitled to

PPI rated at 6% of the whole person attributable to the industrial accident.

36. **Permanent Disability.** Permanent disability is defined and evaluated according to statute. Idaho Code §§ 72-423, 424, 425, 430(1). Some factors are expressly defined by statute and other unexpressed factors may be considered. Idaho Code § 72-430(1). Here, Claimant retained a vocational expert at the 11th hour to generate a disability analysis. Essentially, Ms. Uhlenkott assumed an equal 20% of jobs exist for each exertional level, and determined Claimant was unable to perform three and one-half exertional levels. Her analysis is not supported by the evidence. It appears she simply was not given adequate time to perform a credible analysis.

37. Further, the record shows Claimant made meager attempts to cooperate with physical therapy and with vocational counselors at a time when it could have done him the most good. When Ms. Uhlenkott cited Claimant's protracted absence from the labor market as a factor in her disability analysis, she ignored the fact that he declined to cooperate in attempts to return him to the labor market. Additionally, Claimant retains the network for employment upon which he has relied for his entire adult life – TERO.

38. Claimant showed he suffers some permanent disability in excess of impairment. He has medical restrictions and Dr. Colburn has disapproved some jobs and expressed reservations about others. However, considering all factors, including Claimant's age, education, local labor market, medical and other non-medical factors, Claimant failed to show he suffers significant permanent disability related to the accident. Permanent disability was not established above 15% inclusive of PPI.

39. **Retraining.** Claimant's recent interest and attempt at re-establishing his life are commendable. However, Claimant failed to show the HVAC program is a realistic retraining for him. He failed to cooperate with ICRD when other retraining programs were suggested.

No realistic retraining program has been identified as one Claimant is willing to undertake. Claimant failed to show he is entitled to retraining benefits.

CONCLUSIONS OF LAW

1. Claimant suffered a compensable accident and injury. He is entitled to PPI rated at 6% of the whole person as a result. Defendants are entitled to credit for PPI amounts paid.
2. Claimant failed to show he is entitled to either TTD or medical benefits after May 30, 2002.
3. Claimant showed he is entitled to permanent disability rated at 15%, inclusive of PPI.
4. Claimant failed to show he is entitled to an award of retraining benefits.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

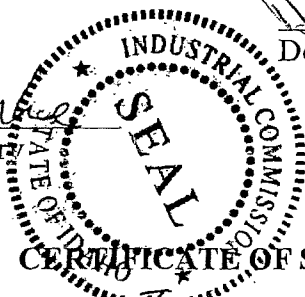
DATED this 12th day of July, 2006.

INDUSTRIAL COMMISSION

ATTEST:

Dona K. Burke
Assistant Commission Secretary

Douglas A. Donohue, Referee



I hereby certify that on the 27th day of July, 2006, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Christopher Caldwell
P.O. Box 607
Lewiston, ID 83501

Glenna M. Christensen
P.O. Box 829
Boise, ID 83701

db

Dona K. Burke

Richard Whitehead
admitted in Idaho, Washington, and Montana
Certified Workers' Compensation Specialist
Thomas B. Amberson
admitted in Idaho and Oregon



Whitehead, Amberson & Caldwell, P.L.L.C.

ATTORNEYS AT LAW

Christopher Caldwell
admitted in Idaho and Washington
Michael Kessinger
admitted in Idaho

August 2, 2006

Robert McCormack
c/o South Idaho Correction Institute
P.O. Box 8509
Boise, ID 83707

Dear Robert:

We have received your decision on your workers compensation case. As I advised you in January 2006 and at other times in my representation of you, I had serious concerns about your ability to be successful in this case. However, you wished to proceed forward without discussing settlement. Unfortunately, my concerns have been realized. Referee Donohue refused to award to you any additional medical care after May 30, 2002, refused to award to you any TTD benefits after May 30, 2002, and refused to award to you any retraining benefits. He did award to you a 15% disability inclusive of the 6% impairment that was awarded by Dr. Colburn. While we submitted your testimony, and the testimony of a vocational expert and a medical expert, the Referee did not find that evidence credible, as you will see in the decision. The Referee also believed that you did not make good attempts at finding work when you could nor that you cooperated with vocational rehabilitation workers to find work.

In order to have any success at an appeal, you must be able to show that there was an error in the application of the law to the facts of the case. Generally, the Supreme Court of Idaho will not review factual determinations made by the Industrial Commission. In order to prevail on appeal, I believe the Industrial Commission's determinations of fact would have to be overturned by the Supreme Court, and I do not believe that would happen. Therefore, while you have a right to appeal this decision, if you wish to do so, you will need to find another attorney. The reason that I will not pursue an appeal on your behalf is threefold: first, I do not believe that an appeal will be successful in this matter; second, I believe the Supreme Court would award the defendants' attorneys fees and costs against you if unsuccessful in your appeal, a potentially expensive matter, and; third, I believe that filing an appeal in this matter would amount to a violation of IAR 11.1, which requires legal foundation for appeal of filing an appeal, subjecting the attorney to personal sanctions. Again, you have a right to appeal this matter however I will not be filing an appeal on your behalf for the reasons stated above. If you wish to file an appeal, you will need to obtain different counsel or pursue the appeal yourself. In the

2230 3rd Avenue North • Lewiston, Idaho 83501
Mail - Post Office Box 607 • Lewiston, Idaho 83501
Telephone: 208.743.5299 • Facsimile: 208.743.7432

Offices in Lewiston and Coeur d'Alene

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)



73

Robert McCormack
August 2, 2006
Page 2

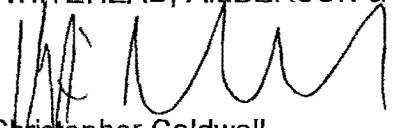
event that you do wish to file an appeal, please be advised that you have 42 days from the date of the Order, or 42 days from July 27, 2006, in which to file such an appeal. If you do not file an appeal within this time, any rights of appeal that you may have would be lost. Again, this office will not file an appeal in this matter.

According to my initial calculations, I believe the award is worth *about* \$16,335.00. I will have a more definite number in the future. In addition to attorney fees, we have advanced approximately \$4,000.00 in costs in the pursuit of your case, most of which came for expert witnesses, including Dr. Dirks and Deb Uhlenkott. As you are currently incarcerated, I am enclosing for your review and signature a limited power of attorney, allowing me to sign the award check on your behalf. I will then make appropriate distributions to this firm for attorney fees, costs advanced and the remainder to you to be sent to a location of your choosing. I have included a self-addressed stamped envelope for the return of the limited power of attorney to my office.

I enclose a copy of the decision and order for your review. After you have received it, you are welcome to call my office with any questions or concerns regarding the decision itself.

Sincerely,

WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.,



Christopher Caldwell
Attorney at Law

CEC/lrm

Enclosures: SASE/decision/LPOA

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

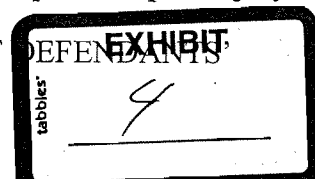
ROBERT J. McCORMACK,)	
)	
Claimant,	)	IC 01-011245
)	
v.)	
)	
ALL VALLEY CONCRETE,)	
)	
Employer,	)	ORDER DENYING
	)	RECONSIDERATION
)	
and)	
)	
EVEREST NATIONAL	)	FILED
INSURANCE COMPANY,	)	SEP 26 2006
)	
Surety,	)	INDUSTRIAL COMMISSION
Defendants.)	
)	

On August 15, 2006, Claimant filed a Motion to Reconsider the Commission decision dated July 27, 2006, together with a brief in support of the motion. Rule 3(f), JRP. Defendants responded on August 22, 2006.

Claimant argues the Commission must "make a determination of Claimant's pre- and post-injury earning capacity," and that the Commission failed to do so in this case. Claimant believes the Commission cannot determine disability or loss of earning capacity without the aforementioned finding, citing to Idaho Code §§ 72-102(11), -423 and -430. Claimant further debates the Commission's finding regarding Claimant expert Deb Uhlenkott and the separate finding regarding the Tribal Employment Rights Office (TERO).

Defendants argue Claimant's inability to engage in gainful employment was due to his own perception that he is disabled, instead of true permanent impairment. Defendants continue by arguing the Commission must only consider pre- and post-injury

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)
ORDER DENYING RECONSIDERATION - 1



wages as a small factor among many other factors, and not as the paramount factor Claimant paints it to be.

While Claimant's argument regarding pre- and post-injury earning capacity is lucid, it is not the law. The Supreme Court has directed the Commission to make disability determinations on the basis of "ability to engage in gainful activity." *Baldner v. Bennett's*, 103 Idaho 458, 462, 649 P.2d 1214, 1218 (1982). The Supreme Court has not directed the Commission to use every factor outlined in Idaho Code § 72-430 when determining disability. Furthermore, neither of Idaho Code §§ 72-423 or -430 actually refer to, or require a determination of a claimant's pre- or post-injury earning capacity. The Commission is to determine disability based on medical impairment and the nonmedical factors of §72-430. As shown by Idaho Code §§ 72-102(11), -423, -430 and *Baldner*, the factors outlined in the statute are not exclusive, nor are they all required to be used. A full analysis of a claimant's "ability to engage in gainful activity" is the requisite key to a disability analysis.

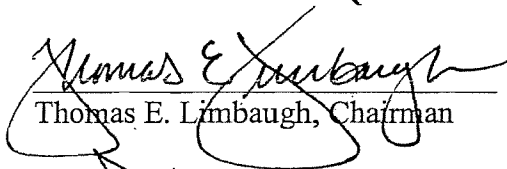
In the case at hand, the Commission noted the requirements of Idaho Code §§ 72-423, -424, -425 and 430(1). Furthermore, before assessing Claimant's disability the Commission considered Claimant's impairment rating, opinions of vocational professionals, Claimant's access to TERO as a job resource, Claimant's medical restrictions, age, education, his local labor market as well as other medical and nonmedical factors. The Commission engaged in a full legal and factual analysis before making a finding regarding disability in this case.

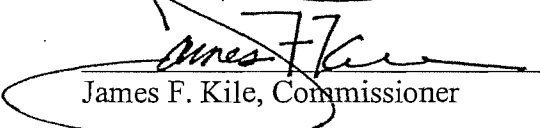
Claimant's issues concerning Uhlenkott and TERO are mere disagreements with the Commission decision of July 27, 2006. Claimant provides no factual or legal basis to warrant a contrary analysis of the findings regarding Uhlenkott and TERO.

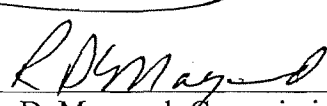
For the above reasons, Claimant's Motion to Reconsider is hereby DENIED.

DATED this 26th day of September 2006.

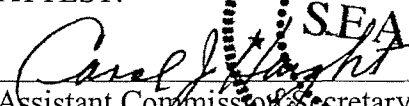

INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman


James F. Kile, Commissioner


R. D. Maynard, Commissioner

ATTEST:

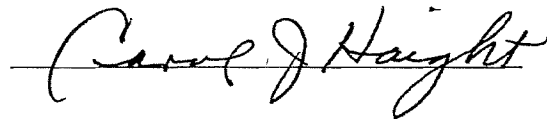

Assistant Commissioner/Secretary


CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September 2006, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

CHRISTOPHER CALDWELL
P.O. BOX 607
LEWISTON, ID 83501

GLENNA M. CHRISTENSEN
P.O. BOX 829
BOISE, ID 83701



5

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

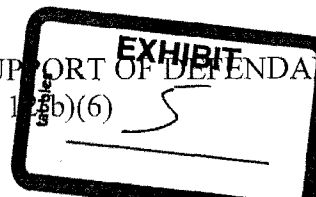
ROBERT McCORMACK,)	
)	
Claimant,)	
)	
v.	)	IC 01-011245
)	
ALL VALLEY CONCRETE,)	
)	
Employer,	)	ORDER APPROVING
	)	ATTORNEY LIEN
and)	
)	
EVEREST NATIONAL INSURANCE	)	FILED
COMPANY,)	
	)	DEC - 1 2006
Surety,)	
Defendants.	)	INDUSTRIAL COMMISSION
)	

On October 2, 2006, Claimant's attorney (Attorney) filed a motion seeking approval of his charging lien for services to his client. Attorney requests fees in the amount of \$4,900.50, which is 30% of the benefits awarded to Claimant as a result of the contested proceedings. Additionally, Attorney requests \$3,924.95 in costs advanced to Claimant in prosecuting his claims. Attorney maintains that Claimant has refused to execute a power of attorney to enable Attorney to distribute the benefit proceeds in accordance with their fee agreement. Also, Claimant is not available to personally endorse the settlement checks with dual payees.

Attorney prosecuted Claimant's case through an adversarial hearing, including legal briefing, and was able to obtain an award of benefits for Claimant. Now that Claimant has recovered an award, he disputes the disbursement of attorney fees and costs.

There is no question that Attorney is entitled to 30% of the award for reasonable attorney fees, which is the sum of \$4,900.50 (30% x \$16,335.00). IDAPA 17.02.08.033.01.e.ii.

ORDER APPROVING ATTORNEY LIEN - 1
 AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANT'S
 MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)



Attorney also seeks costs of \$3,924.95. A detailed, itemized list of expenses and costs is attached as an affidavit in support of the motion. The expenses begin on August 20, 2001, the day the fee agreement was signed by Claimant and Attorney. These expenses run consistently thereafter for the next five years until September 29, 2006. There is no information from Attorney that Claimant was informed of this amount as these charges accumulated over this time period. Comparing these expenses to the overall benefits recovered, it would appear that these expenses are 24% of the benefits awarded. Understandably, Claimant was probably shocked when the total bill was presented to him. Had Claimant known of the extent of these charges as they were accumulating, he and Attorney could have discussed them during the time of representation. The fee agreement contemplates a regular billing of these expenses, with interest accruing on the unpaid balances. The itemized charges do not contain an "interest" account on the ledger.

This is a perplexing problem. Attorney has completed a long and difficult case, while providing over five years of legal service to his client. Now that the results are in, the client does not want to pay the bill. This is not an unusual situation.

In balancing the equities, the Commission finds good cause to adjust the expenses because of Claimant's lack of involvement in their accumulation over the past five years. As a result, the Commission will reduce the amount of expenses by \$1,000.00 to the sum of \$2,924.95 in this matter.

For the above reasons, the Motion for a Charging Lien on the benefits awarded to Claimant is hereby GRANTED, as modified in the following particular amounts. Attorney shall be entitled to the sum of \$4,900.50 for reasonable attorney fees in representing Claimant during the above-referenced proceedings. Further, Attorney shall be entitled to receive the amount of

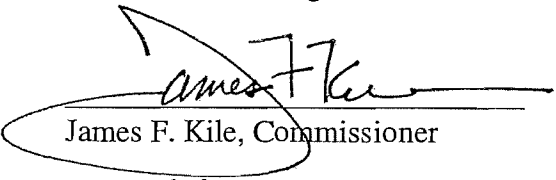
\$2,924.95 for reasonable expenses associated with representing Claimant in the above-referenced proceedings.

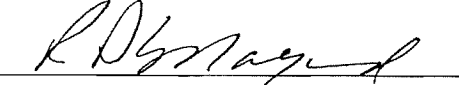
IT IS SO ORDERED.

DATED this 1st day of December, 2006.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman


James F. Kile, Commissioner


R. D. Maynard, Commissioner

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

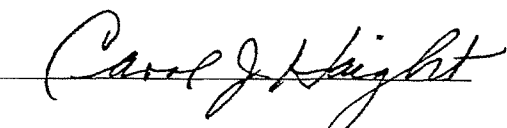
I hereby certify that on the 1st day of Dec., 2006 a true and correct copy of **Order Approving Attorney Lien** was served by regular United States Mail upon each of the following persons:

CHRISTOPHER CALDWELL
PO BOX 607
LEWISTON ID 83501-0607

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

ROBERT McCORMACK
C/O SOUTH IDAHO CORRECTION INSTITUTE
PO BOX 8509
BOISE ID 83707-8509

cjh



ORDER APPROVING ATTORNEY LIEN IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. McCORMACK,

Claimant,

v.

ALL VALLEY CONCRETE,

Employer,

and

EVEREST NATIONAL
INSURANCE COMPANY,Surety,
Defendants.

IC 01-011245

ORDER ALLOWING
WITHDRAWAL OF
ATTORNEY OF RECORD

FILED

DEC - 7 2006

INDUSTRIAL COMMISSION

Christopher Caldwell, attorney of record for Claimant in the above-entitled matter, filed a Motion to Withdraw as Attorney of Record with supporting Affidavit on September 29, 2006, seeking from the Commission an Order allowing withdrawal as counsel. Good cause appearing therefor,

IT IS HEREBY ORDERED that Christopher Caldwell be permitted to withdraw as attorney of record for Claimant, Robert McCormack, and

IT IS FURTHER ORDERED that Christopher Caldwell shall notify Claimant by immediate mailing by certified mail a copy of this Order to the Claimant at his last known address and file an affidavit with the Commission verifying that such mailing has been done.

IT IS FURTHER ORDERED that Christopher Caldwell shall continue to represent Claimant until the affidavit has been filed with the Industrial Commission.

Once Christopher Caldwell files his affidavit, Claimant may either hire another attorney

ORDER ALLOWING WITHDRAWAL OF ATTORNEY OF RECORD - 1

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO I.R.C.P. RULE 12(b)(6)

EXHIBIT

tabbies

or may appear as representing himself by sending a **written letter** to the Industrial Commission stating representation. Claimant must inform the Commission of representation and comply with this Order **within twenty-one (21) days of the date this Order was served on Claimant.** If Claimant fails to appear in writing within this time period, either on own behalf or with an attorney, Claimant's Complaint may be dismissed without further notice, at the discretion of the Commissioners.

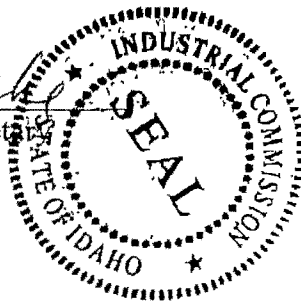
IT IS SO ORDERED.

DATED this 7th day of December, 2006.

INDUSTRIAL COMMISSION

ATTEST:

Glenna K. Burke
Assistant Commission Secretary



Douglas A. Donohue, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2006, a true and correct copy of the foregoing **ORDER ALLOWING WITHDRAWAL OF ATTORNEY OF RECORD** was **Sent by Facsimile Machine Process ONLY** to each of the following:

Christopher Caldwell Fax #: 208-743-7432

Glenna M. Christensen Fax #: 385-5384

db

Glenna K. Burke

ORDER ALLOWING WITHDRAWAL OF ATTORNEY OF RECORD - 2

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

82

CHRISTOPHER CALDWELL
WHITEHEAD, AMBERSON
& CALDWELL, P.L.L.C.
Attorneys at Law
Post Office Box 607
Lewiston, ID 83501
Telephone: (208) 743-5299
Facsimile: (208) 743-7432
ISB No. 5134

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

ROBERT McCORMACK,

Claimant,

vs.

ALL VALLEY CONCRETE,

Employer,

and

EVEREST NATIONAL INSURANCE
COMPANY,

Surety,

Defendants.

I.C. No. 01-011245

AFFIDAVIT OF CHRISTOPHER
CALDWELL

STATE OF IDAHO

)
)ss
)

County of Nez Perce

YOUR AFFIANT, being first duly sworn, does hereby state and affirm as follows:


- 1) That your Affiant is over the age of eighteen, of sound mind, and has personal knowledge of the following;
- 2) That your Affiant, on December 8, 2006, did cause a copy of the Order Allowing Withdrawal of Attorney of Record to be placed into the U.S.

AFFIDAVIT OF
CHRISTOPHER CALDWELL
AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

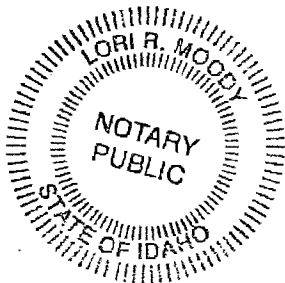
Mail, postage pre-paid, via certified mailing, addressed as follows:

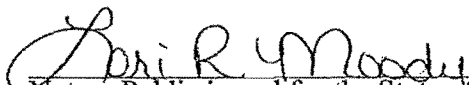
Robert McCormack
c/o South Idaho Correction Institute
P.O. Box 8509
Boise, ID 83707

3) Further your affiant sayeth not.


Christopher Caldwell
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 8th day of December, 2006.




Notary Public in and for the State of Idaho
Residing at: Newton, ID
Commission Expires: 9-3-08

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8 day of December, 2006, a true and correct copy of the foregoing was sent via U.S. Mail, postage prepaid to:

Glenna M. Christensen
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD.
P.O. Box 829
Boise, ID 83701

And by Certified Mail to the following:

Robert McCormack
c/o South Idaho Correction Institute
P.O. Box 8509
Boise, ID 83707


Christopher Caldwell

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT McCORMACK,)	
)	
Claimant,	)	IC 01-011245
v.)	
)	
ALL VALLEY CONCRETE,	)	ORDER ON PENDING
	)	MOTIONS
Employer,)	
and)	
)	
EVEREST NATIONAL INSURANCE	)	FILED
COMPANY,)	
	)	FEB - 5 2007
Surety,	)	INDUSTRIAL COMMISSION
)	
Defendants.)	

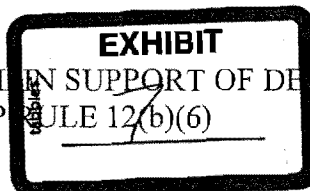
A brief procedural history is set forth below as background to the variety of motions addressed in this order.

On July 27, 2006, the Commission issued a Decision and Order concluding that Claimant was entitled to 6% whole person PPI and a permanent disability rating of 15%, inclusive of PPI. Claimant filed a Motion to Reconsider on August 17, 2006. The Commission denied the motion on September 26, 2006.

Then on October 2, 2006, Claimant's attorney, Christopher Caldwell, filed a Motion for Leave to Withdraw as Counsel. By order filed December 7, 2006, and Affidavit of Christopher Caldwell filed December 11, 2006, Mr. Caldwell was permitted to withdraw as counsel of record.

ORDER ON PENDING MOTIONS - 1

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)



On December 20, 2006, Claimant filed a letter stating that he would be representing himself.

On October 2, 2006, Christopher Caldwell also filed a Motion for Approval of Attorney Fees -- Charging Lien. On December 1, 2006, the Commission issued an Order Approving Attorney Lien, which granted Mr. Caldwell attorney fees equal to 30% of Claimant's award but reducing the requested costs by \$1,000.00.

Currently pending before the Commission are Claimant's Motion to Reconsider the award of attorney fees, Christopher Caldwell's Motion to Reconsider the reduction of costs awarded, Defendants' Motion for Clarification and Direction, and a letter from Claimant requesting appeal forms.

Claimant's Motion to Reconsider

On December 6, 2007, Claimant filed a letter the Commission will construe as a Motion for Reconsideration. Claimant argues that the attorney fee agreement he signed in 2001 gave Christopher Caldwell 25% of Claimant's award, not 30%. A review of the agreement shows that Claimant agreed to pay attorney fees to Christopher Caldwell in the amount of 30% of Claimant's award after commencement of hearing by the Industrial Commission. Exhibit B to the Affidavit in Support of Motion for Approval of Attorney Fees-Charging Lien filed October 2, 2006. Claimant's case did go to hearing, was fully briefed, and a decision and order were issued by the Commission.

Attorney, Christopher Caldwell is entitled to reasonable fees, which are defined as 30% of available funds in a case in which a hearing has been held and briefs submitted. IDAPA 17.02.08.033.01.e.ii. The Commission finds no reason to disturb its previous ruling awarding Christopher Caldwell attorney fees in the amount of 30% of Claimant's award. Therefore, Claimant's Motion to Reconsider is DENIED.

ORDER ON PENDING MOTIONS - 2

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

Christopher Caldwell's Motion to Reconsider

On December 18, 2006, Christopher Caldwell filed Attorney's Motion to Reconsider. In his motion, Mr. Caldwell argues he is entitled to the full amount of costs incurred without a \$1,000.00 reduction in costs because of Claimant's alleged lack of involvement over the course of the case. Mr. Caldwell avers that Claimant was specifically advised of the expenses associated with all three experts called in pursuing his claim and that Claimant was well aware of the expenses and the odds of recovery of the various benefits sought at hearing.

The Commission has reviewed the file and agrees with Mr. Caldwell that there is no evidence to show Claimant lacked involvement in the incurring of expenses. The costs are large when compared to Claimant's total award but that is the risk inherent in pursuing a case through the hearing process. The Commission does not find the total amount of costs to be unreasonable but instead finds that they were incurred to zealously litigate Claimant's case at hearing.

Upon reconsideration, the Commission awards Mr. Caldwell the actual costs incurred of \$3,924.95. Attorney's (Christopher Caldwell's) Motion to Reconsider is GRANTED.

Defendants' Motion for Clarification and Direction

A Notice of Lodging of Asserted Assignment was filed with the Commission on December 5, 2006 by attorney Christopher Caldwell. The notice included a copy of an assignment submitted by attorney Todd Richardson of the Law Office of James W. Grow in the amount of \$2,500.00. The assignment states that "Robert J. McCormack hereby assigns to Todd S. Richardson \$2500.00 of any settlement amount and hereby directs his attorney, Christopher Caldwell of Whitehead, Amberson & Caldwell, PLLC, to hold and pay directly to the Law Office of James W. Grow an amount totaling \$2500.00 out of any amount received through settlement, judgment, or partial payment." Exhibit A

ORDER ON PENDING MOTIONS - 3

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

to the Notice of Lodging of Asserted Assignment filed December 5, 2006. Subsequently, Defendants filed a Motion for Clarification and Direction on December 8, 2006, requesting guidance in the distribution of Claimant's award in light of the filing of the Notice of Lodging of Asserted Assignment.

Idaho Code § 72-802 states that no claims for compensation under this law shall be assignable, and all compensation and claims therefore shall be exempt from all claims of creditor, except the enforcement of an order of any court for support of any person. Accordingly, Claimant's claim for compensation is not assignable to Mr. Richardson and Defendants are to deliver the amount due to Claimant directly to Claimant without regard to the assignment discussed above.

Claimant's letter requesting appeal forms

Additionally, on December 26, 2006, Claimant filed a letter requesting information on filing an appeal and inquiring if an appeal form is needed. The Commission does not produce or supply appeal forms. Parties may make an appeal to the Supreme Court from decisions and orders of the Commission and within the times and in the manner prescribed by Rule of the Supreme Court. Idaho Code § 72-724 and Idaho Appellate Rule 14(b).

Based upon the foregoing reasons, Attorney's (Christopher Caldwell's) Motion to Reconsider is GRANTED and Claimant's Motion to Reconsider is DENIED.

IT IS SO ORDERED.

DATED this 5th day of February, 2007.

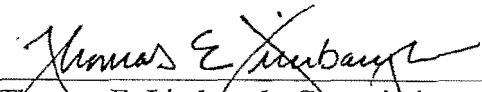
INDUSTRIAL COMMISSION


James F. Kile, Chairman

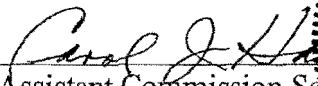
ORDER ON PENDING MOTIONS - 4

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)


R.D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary



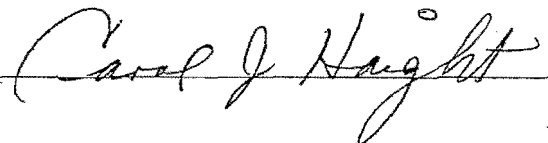
CERTIFICATE OF SERVICE

I hereby certify that on 5th day of February, 2007, a true and correct copy of the foregoing ORDER ON PENDING MOTIONS was served by regular United States Mail upon each of the following:

ROBERT McCORMACK
IDOC/ISCI
PO Box 14
Boise, ID 83707

GLENNA M CHRISTENSEN
PO Box 829
Boise, ID 83701-0829

CHRISTOPHER CALDWELL
PO Box 607
Lewiston, ID 83501



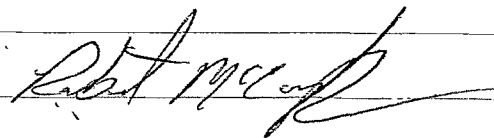
ORDER ON PENDING MOTIONS - 5
AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

SV
/

 COPY

"
TO WHOM IS IN CHARGE"

THIS IS ROBERT MCCORMACK AND I AM WRITING IN
REGARDS TO MY EX-ATTORNEY CHRIS CALDWELL ASKING
THAT HE BE ENTITLED TO 30% OF BENEFITS AWARDED.
I HAVE AN AGREEMENT I SIGNED BACK IN 2001
THAT I INDORCED FOR AGREEMENT OF 25% OF WHAT
I GOT FROM A SETTLEMENT. I ADVISE YOU NOT TO FORWARD
ANY TYPE OF MONEY THAT IS OWED TO ME AND WHAT EVER
IS OWED TO MR CALDWELL WILL BE DEALT APPROPRIATELY.
I WILL BE SENDING THE COPY THAT I SIGNED WHEN
IT BECOMES AVAILABLE. I WILL BE IN CONTACT. HIS
CLAIM IS WAY OUT OF THE AMOUNT HE DESIRES. THANK
YOU



2008 DEC -6 A 10:11
RECEIVED
INDUSTRIAL COMMISSION

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

OFFENDER NAME Robert McCall
 OFFENDER NO 32915 HOUSING UNIT 2-H-15
 IDAHO DEPARTMENT OF CORRECTION
 INSTITUTION I.S.C.I.
 ADDRESS P.O. BOX 14 ☐
 CITY Boise STATE ID ZIP 83720
 OFFENDER CORRESPONDENCE

2005 DEC -6 A RECEIVED
 INDUSTRIAL COMMISSION



BOISE ID 837
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STATE OF IDAHO
 Industrial Commission
 P.O. Box 83720
 Boise, ID 83720-0041

8372000041

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

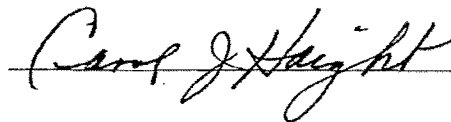
ROBERT McCORMACK,)
)
 Claimant,)
)
 v.)
)
 ALL VALLEY CONCRETE,)
)
 Employer,) IC 2001-011245
)
 and)
)
 EVEREST NATIONAL INSURANCE)
 COMPANY,)
)
 Surety,)
 Defendants.)
)

I hereby certify that on the 8th day of Dec., 2006 a true and correct copy of Claimant's letter construed as a motion for reconsideration on the attorney lien, filed December 6, 2006 was served by regular United States Mail upon:

CHRISTOPHER CALDWELL
PO BOX 607
LEWISTON ID 83501-0607

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

cjh



cc: Robert McCormack
Idaho Department of Correction Institute
PO Box 14
Boise, ID 83707

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

09/25/02 BENEFIT PAYMENT HISTORY (07)
LO: LEWISTON
SSN: [REDACTED] 0 NAME: ROBERT J MCCORMACK BYE: 02/15/03
WBA: 315.00 BALANCE: .00 LAST BWE AVAILABLE ON VRU: 09/07/02

WEEK-END DATE	DEDUCT EARN	OTHER INCOME	AMT PAID	DATE PAID	DATE PROC	CHECK NO	OVRPAY AMT	PG CD V	PAY TYPE
08/31/02	.00	.00	315.00	09/04/02	0903	2414552	.00	21 0	1 T#
08/24/02	.00	.00	315.00	08/27/02	0826	2401747	.00	21 0	1 T#
08/17/02	.00	.00	315.00	08/20/02	0819	2387777	.00	21 0	1 T#
08/10/02	.00	.00	315.00	08/13/02	0812	2373140	.00	21 0	1 T#
08/03/02	.00	.00	315.00	08/06/02	0805	2358425	.00	21 0	1 T#
07/27/02	.00	.00	315.00	07/30/02	0729	2344007	.00	21 0	1 T#
07/20/02	.00	.00	315.00	07/23/02	0722	2329967	.00	21 0	1 T#
07/13/02	.00	.00	315.00	07/16/02	0715	2315832	.00	21 0	1 T#
07/06/02	.00	.00	315.00	07/12/02	0708	2307066	.00	21 0	51 T#
06/29/02	.00	.00	315.00	07/02/02	0701	2283640	.00	01 0	1 T#
06/22/02	.00	.00	315.00	06/25/02	0624	2267665	.00	01 0	1 T#
06/15/02	.00	.00	315.00	06/21/02	0620	2258054	.00	01 0	1 T#
06/08/02	.00	.00	315.00	06/11/02	0610	2235340	.00	01 0	1 T#

FOR MORE THAN 13 PAYMENTS DEPRESS PF2

TRANSACTION OPTION:

Job Service
1158 Idaho Street
P.O. Box 1147
Lewiston, ID 83501
Phone # 799-5000
Fax # 799-5007

EXHIBIT

~~AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'~~

MOTION TO DISMISS PURSUANT TO IRCP R. ~~12(b)(6)~~

Date: 9/25/2002 Time: 11:34:06 AM

00046

93

09/25/02 BENEFIT PAYMENT HISTORY (07)
 LO: LEWISTON
 SSN: [REDACTED] 0 NAME: ROBERT J MCCORMACK BYE: 02/15/03
 WBA: 315.00 BALANCE: .00 LAST BWE AVAILABLE ON VRU: 09/07/02

WEEK-END DATE	DEDUCT EARN	OTHER INCOME	AMT PAID	DATE PAID	DATE PROC	CHECK NO	OVRPAY AMT	PG CD V	PAY TYPE
06/01/02	.00	.00	315.00	06/04/02	0603	2218129	.00	01 0	1 T#
05/25/02	.00	.00	315.00	05/29/02	0528	2201014	.00	01 0	1 T#
05/18/02	.00	.00	315.00	05/21/02	0520	2182666	.00	01 0	1 T#
05/11/02	.00	.00	315.00	05/14/02	0513	2164418	.00	01 0	1 T#
05/04/02	.00	.00	315.00	05/07/02	0506	2145030	.00	01 0	1 T#
04/27/02	.00	.00	315.00	04/30/02	0429	2124703	.00	01 0	1 T#
04/20/02	.00	.00	315.00	04/23/02	0422	2103438	.00	01 0	1 T#
04/13/02	.00	.00	315.00	04/16/02	0415	2080907	.00	01 0	1 T#
04/06/02	.00	.00	315.00	04/09/02	0408	2058490	.00	01 0	1 T#
03/30/02	.00	.00	315.00	04/02/02	0401	2034382	.00	01 0	1 T#
03/23/02	.00	.00	315.00	03/26/02	0325	2009501	.00	01 0	1 T#
03/16/02	.00	.00	315.00	03/19/02	0318	1983333	.00	01 0	1 T#
03/09/02	.00	.00	315.00	03/13/02	0311	1968166	.00	01 0	51 T#

FOR MORE THAN 13 PAYMENTS DEPRESS PF2

TRANSACTION OPTION:

~~AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'~~

MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

Date: 9/25/2002 Time: 11:34:11 AM

00047

94

09/25/02 B E N E F I T P A Y M E N T H I S T O R Y (07)

LO: LEWISTON

SSN: [REDACTED] 0 NAME: ROBERT J MCCORMACK

BYE: 02/15/03

WBA: 315.00 BALANCE: .00

LAST BWE AVAILABLE ON VRU: 09/07/02

WEEK-END	DEDUCT	OTHER	AMT	DATE	DATE	CHECK	OVRPAY	PG	PAY
DATE	EARN	INCOME	PAID	PAID	PROC	NO	AMT	CD V	TYPE
03/02/02	.00	.00	315.00	03/05/02	0304	1935060	.00	01 0	1 T#
02/23/02	.00	.00	.00		0225	0000000	.00	01 0	4 T

FOR MORE THAN 13 PAYMENTS DEPRESS PF2

TRANSACTION OPTION:

~~AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'~~

MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)
Date: 9/25/2002 Time: 11:34:17 AM

00048

95

Robert McCormack #35
CCA/ICC A-Pod
P.O.Box 70010
Boise, ID. 83707

IN THE DISTRICT COURT OF THE 2 JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

Robert McCormack,)
)
Plaintiff,)
)
VS.)
)
Christopher Caldwell,)
)
Defendant,)
)

Case No. _____
AFFIDAVIT OF
Robert McCormack in support
of Motion for Malpractice

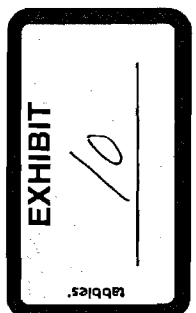
STATE OF IDAHO)
) ss
County of Nez Perce)

I Robert McCormack, after first being duly sworn upon his
oath, deposes and says as follows: That

1. I am the named affiant in the above entitled affidavit;
2. I am under the care, custody and control of Phillip Valdez
acting Warden of the Idaho Correctional Center;
3. That I never refused any offers from anybody pertaining
to this case ;
4. The only time I discuss any figure of money is when Attorney
Christopher Caldwell stated that the Insurance Company offered
60,000 dallors, and in this conversion I asked Mr.Caldwel to
ask the Insurance Company if they would also pay the medical
costs of the (surgery);
5. Orthopoedist-Regan Hansen M.D. did a Lumbar (M.R.I) on July
22,2001, and it showed a medium sized herniated disc at L 4-5

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)
a moderate sized bulging disc on the left at L 3-4;

(Affidavit of Robert McCormack (1)



96

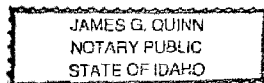
6. Dr. William Bozarth M.D. did (EMG/NCV) on claimant Robert McCormack Neurologist, William Hill M.D. on September 8, 2005 and Orthopaedist Gregory Dietrich, M.D. Concurred that consideration for "Surgery";
7. Vocational expert Ms. Uhlenkott, was not given adequate time to perform a credible analysis;
8. Attorney Christopher Caldwell "provides no factual or legal basis to warrant a contrary analysis;
9. Attorney Christopher Caldwell never kept me updated on any part of the litigation of my case;
10. Mr. Caldwell told me I could not Appeal the decision of the commission and then dismissed himself from the case;
11. The only thing that I signed was the agreement of the percentage he want when settlement was final;
12. The above statements are true and correct to the best of my knowledge and belief.

Further your affiant sayeth naught.

DATED This 8 day of FEB 2008.

Robert McCormack
Plaintiff

SUBSCRIBED AND SWORN To before me this 8 day of February 2008.



James G. Quinn
Notary Public for Idaho
Residing at: _____
Commission expires: 9-10-13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9 day of FEB- 2008. I
mailed a true and correct copy of the AFFIDAVIT of
Robert McCormack via the U.S. mail system to:

CHRISTOPHER CALDWELL

P.O. Box 607

LEWISTON, ID-

83501

Robert McCormack

Plaintiff

AFFIDAVIT OF CHRISTOPHER CALDWELL IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS PURSUANT TO IRCP RULE 12(b)(6)

RICHARD WHITEHEAD ISB #2851
WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.
2230 3rd. Ave. N.
P.O. Box 607
Lewiston, ID 83501
Telephone: (208) 743-5299
Facsimile: (208) 743-7432

FILED
2009 AUG 28 PM 12 17

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,)
)
Plaintiff,)
)
vs.)
)
CHRISTOPHER E. CALDWELL and)
WHITEHEAD, AMBERSON &)
CALDWELL, PLLC,)
)
Defendant)
)
)
)

CASE NO. CV2009-1218

AFFIDAVIT OF RONDA K.
NICHOLS IN SUPPORT OF
DEFENDANTS' MOTION
TO DISMISS PURSUANT TO
IRCP RULE 12(b)(6)

STATE OF IDAHO)
)ss.
County of Nez Perce)

YOUR AFFIANT, having first been duly sworn, states as follows:

1. That I am over the age of eighteen, of sound mind and have personal knowledge
of the following:

AFFIDAVIT OF RONDA K NICHOLS IN SUPPORT OF MOTION TO DISMISS
PURSUANT TO PURSUANT TO IRCP RULE 12(b)(6) -

1

ORIGINAL
99

2. That during the period of May 1999 through February 2003, I was employed as a paralegal for Whitehead, Amberson & Caldwell, PLLC, and worked in the Lewiston offices of Whitehead, Amberson & Caldwell, PLLC. I assisted Mr. Caldwell in preparation of Plaintiff's workers compensation case arising from his industrial accident of April 9, 2001.

3. Attached hereto as Exhibit 'A' and made a part of this Affidavit by reference is a copy of check #85322142 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I hand-delivered this check to Plaintiff on September 7, 2001. I placed the received stamp on the check, indicating that our office received the check on September 7, 2001. As reflected in my notation, I hand-delivered the original of this check to Plaintiff on September 7, 2001, by placing said check into his hand.

4. Attached hereto as Exhibit 'B' and made a part of this Affidavit by reference is a copy of check #85329693 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I hand-delivered this check to Plaintiff on September 20, 2001. I placed the received stamp on the check, indicating that our office received the check on September 20, 2001. As reflected in my notation, I hand-delivered the original of this check to Plaintiff on September 20, 2001, by placing said check into his hand.

5. Attached hereto as Exhibit 'C' and made a part of this Affidavit by reference is a copy of check #85621662 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I hand-delivered this check to Plaintiff on October 5, 2001. I

placed the received stamp on the check, indicating that our office received the check on October 5, 2001. As reflected in my notation, I hand-delivered the original of this check to Plaintiff on October 5, 2001, by placing said check into his hand.

6. Attached hereto as Exhibit 'D' and made a part of this Affidavit by reference is a copy of check #85633767 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$1,036.50. At the bottom of the copy is my notation indicating that I hand-delivered this check to Plaintiff on October 23, 2001. I placed the received stamp on the check, indicating that our office received the check on October 23, 2001. As reflected in my notation, I hand-delivered the original of this check to Plaintiff on October 23, 2001, by placing said check into his hand.

7. Attached hereto as Exhibit 'E' and made a part of this Affidavit by reference is a copy of check #85845915 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I hand-delivered this check to Plaintiff on November 8, 2001. I placed the received stamp on the check, indicating that our office received the check on November 8, 2001. As reflected in my notation, I hand-delivered the original of this check to Plaintiff on November 8, 2001, by placing said check into his hand.

8. Attached hereto as Exhibit 'F' and made a part of this Affidavit by reference is a copy of check #85857768 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I mailed this check via US Mail to Plaintiff on November 21, 2001. I placed the received stamp on the check, indicating that our office received the

check on November 21, 2001. As reflected in my notation, I placed the original of

Exhibit 'F' into the US Mail, postage pre-paid to the PO Box in Lapwai, ID provided to our office by Plaintiff on November 21, 2001.

9. Attached hereto as Exhibit 'G' and made a part of this Affidavit by reference is a copy of check #86141421 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I hand-delivered this check to Plaintiff on December 7, 2001. I placed the received stamp on the check, indicating that our office received the check on December 7, 2001. As reflected in my notation, I hand-delivered the original of this check to Plaintiff on December 7, 2001, by placing said check into his hand.

10. Attached hereto as Exhibit 'H' and made a part of this Affidavit by reference is a copy of check #86149197 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I mailed this check via US Mail to Plaintiff on December 19, 2001. I placed the received stamp on the check, indicating that our office received the check on December 19, 2001. As reflected in my notation, I placed the original of Exhibit 'H' into the US Mail, postage pre-paid to the PO Box in Lapwai, ID provided to our office by Plaintiff on December 19, 2001.

11. Attached hereto as Exhibit 'I' and made a part of this Affidavit by reference is a copy of check #86157027 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I mailed this check to Plaintiff and a notation that I hand-delivered this check to Plaintiff on January 3, 2002. I placed the received stamp on the check, indicating that our office received the check on January 3, 2002. As reflected in

my notation, I originally had placed the original of the check into the outgoing mail at the office when Plaintiff came by requesting the check. Therefore, I pulled the check from the internal outgoing mail and hand-delivered the original of this check to Plaintiff on January 3, 2002.

12. Attached hereto as Exhibit 'J' and made a part of this Affidavit by reference is a copy of check #86167962 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$891.00. At the bottom of the copy is my notation indicating that I hand-delivered this check to Plaintiff on January 22, 2002. I placed the received stamp on the check, indicating that our office received the check on January 22, 2002. As reflected in my notation, I hand-delivered the original of this check to Plaintiff on January 22, 2002, by placing said check into his hand.

13. Attached hereto as Exhibit 'K' and made a part of this Affidavit by reference is a copy of check #86406939 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$1,010.57. At the bottom of the copy is my notation indicating that I "mailed/hand-delivered" this check to Plaintiff on February 4, 2002. I placed the received stamp on the check, indicating that our office received the check on February 4, 2002. As reflected in my notation, I originally had placed the original of the check into the outgoing mail at the office when Plaintiff came by requesting the check. Therefore, I pulled the check from the internal outgoing mail and hand-delivered the original of this check to Plaintiff on February 4, 2002. At that time, I also caused to be hand-delivered to Plaintiff a copy of a letter from the surety in the underlying workers compensation case wherein it advised that Plaintiffs total

temporary disability checks would be terminated if he continued in his non-compliance

with physical therapy. A true and correct copy of said letter is attached hereto as Exhibit 'L,' and made a part of this Affidavit by reference.

14. Attached hereto as Exhibit 'M' and made a part of this Affidavit by reference is a copy of check #86418945 made payable to Robert J McCormick (sic) from payee Crawford and Co. payable in the amount of \$946.80. At the bottom of the copy is my notation indicating that I hand-delivered this check to Plaintiff on February 19, 2002. I placed the received stamp on the check, indicating that our office received the check on February 19, 2002. As reflected in my notation, I hand-delivered the original of this check to Plaintiff on February 19, 2002, by placing said check into his hand.

15. At no time were any of the checks reflected in Exhibits A through K and Exhibit L ever deposited into the trust account of Whitehead, Amberson & Caldwell, PLLC, or any other account of Whitehead, Amberson & Caldwell.

16. At no time were any of the checks reflected in Exhibits A through K and Exhibit L ever deposited into my personal bank accounts or by me at any account at Moneytree.

17. Each of the checks reflected in Exhibit A through K and Exhibit L were received by the offices of Whitehead, Amberson & Caldwell, PLLC, in the regular course of business. The copies of said checks reflected in Exhibit A through K and Exhibit L are true and correct copies of the checks received by Whitehead, Amberson & Caldwell, PLLC, and the copies themselves were made and kept in the regular course and scope of business, having been made by your Affiant.

18. When each of the checks reflected in Exhibit A through K and Exhibit L were received by the offices of Whitehead, Amberson & Caldwell, PLLC, it was my

practice and habit as a paralegal to, upon receipt of said check, deliver said checks to Plaintiff pursuant to his instruction. It was my practice and habit to stamp each check received upon receipt and indicate the date such was received in the line where indicated. It was also my practice and habit to hand-write the method of delivery to Plaintiff of said check upon the copy of said check that was maintained in our office.

19. I followed the procedure and protocol of Whitehead, Amberson & Caldwell, PLLC, in the delivery of the aforementioned checks to Plaintiff.

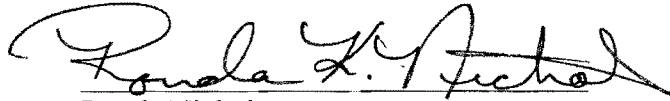
20. Copies of each of the checks reflected in Exhibit A through K and Exhibit L were kept as part of the client file in order to ensure that the client received appropriate benefits due him under Title 72 of the Idaho Code.

21. I was the only employee of Whitehead, Amberson & Caldwell, PLLC, to handle the originals of the checks reflected in Exhibit A through K and Exhibit L. I caused each of those original checks to be delivered to Plaintiff pursuant to his instructions. At no time did I endorse Plaintiff's name on the check, nor did any one else at Whitehead, Amberson & Caldwell, PLLC, endorse Plaintiff's name on the check.

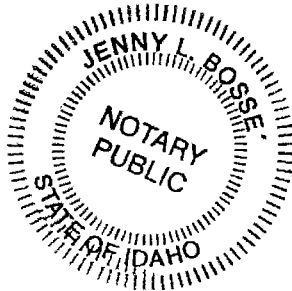
21. During the course of Defendants' representation of Plaintiff, I had opportunity to notarize Plaintiff's signature pursuant to law. As such, I became familiar with Plaintiff's signature. The signatures of Robert McCormack on Exhibits D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12 and F1 and F2 attached to Plaintiff's Civil Complaint appear to be the signature of Plaintiff.

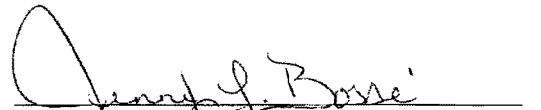
22. Generally when Plaintiff picked up the checks reflected in Exhibit A through K and Exhibit L, he would come to the office obviously intoxicated and smelling of alcohol.

Further your Affiant saith naught.


Ronda Nichols

Subscribed and sworn to before me this 27th day of August, 2009.




Notary Public for the State of Idaho
My Commission Expires: 9-22-09

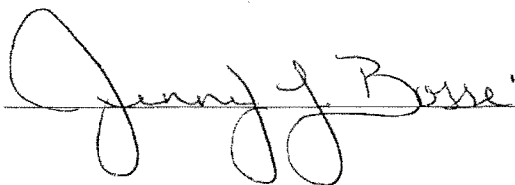
CERTIFICATE OF MAILING

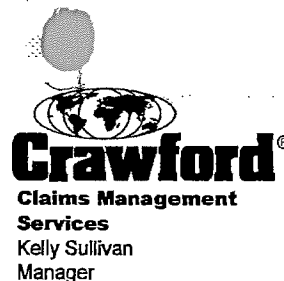
I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, by the undersigned this 28th day of August, 2009, to:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

And

DeWayne Shedd
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707





January 31, 2002

Whitehead, Amberson, & Caldwell
Mr. Christopher Caldwell, Attorney at Law
P. O. Box 607
Lewiston, ID 83501

RE: EMPLOYER: All Valley Concrete
 EMPLOYEE: Robert McCormick
 DATE/INJURY: 04/09/01
 FILE NO: 171-64501

Dear Ms. Nichols:

This letter is in follow up to our numerous telephone conversations Ronda Nichols, Workers' Compensation Paralegal, regarding your client, Mr. Robert McCormick.

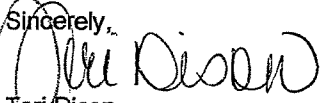
We have agreed to let Mr. McCormick continue with his treatments with Dr. Hill. Dr. Hill has referred the claimant to physical therapy, which was to begin on 01/25/02, but the claimant did not show for this appointment due to transportation problems. As you are aware, we will reimburse for mileage, and if necessary, pay for a taxicab (on occasion).

As we discussed on the telephone, if Mr. McCormick is non-compliant with his physical therapy treatment, we will suspend his temporary total disability benefits until such time as he becomes compliant. As of the date of this letter, if Mr. McCormick fails to attend one more physical therapy appointment, we will suspend his benefits.

We also discussed the medical treatments that Mr. McCormick is receiving from the Nimiipuu Clinic and advised you that we will no longer pay for any medical treatments to this clinic under this workers' compensation claim as the treating physician is Dr. Hill.

If you have any questions or concerns regarding this letter, please contact our office.

Sincerely,


Teri Dison,
Claims Adjuster

received
2-4-02 lrf

LewiWAC

119

146 S. Cole Rd. ■ Boise, Idaho 83709 ■ (208) 375-5021 ■ Fax (208) 375-4514 ■ www.crawfordandcompany.com

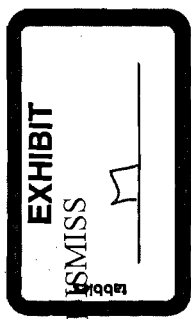
AFFIDAVIT OF RONDA K. NICHOLS IN SUPPORT OF MOTION TO DISMISS
PURSUANT TO IRCP RULE 12(b)(6)

EXHIBIT

tabbies

L

120



XXX FORM Alignment

CRAWFORD & COMPANY - ATLANTA, GEORGIA

CHECK NO.

64-79
611

ON BEHALF OF: EVEREST NATIONAL				ACCT CODE 9119		9119		CHECK NO. 86418945		0086418945	
DATE ISSUED 02/14/02	BRANCH 0171	ORIGINATING OFFICE FILE 064501	CLMT 001	BRANCH 0171	REFERRAL OFFICE FILE 064501	CLMT 001	CLAIM NO. 30102198		ACCT/CLAIMS MADE DATE 04/09/01		
CLIENT CODE 12828		CLIENT/INSURED NAME ALL VALLEY BOBCATS				CLAIMANT NAME MC CORMICK, ROBERT J				DSCOT	
CLAIM/INDEMNITY \$*****946.80		MEDICAL \$*****.00		EXPENSE \$*****.00		PAY CODE 17		DISABILITY PERIOD - THIS CHECK FROM 01/31/02		THRU 02/13/02	
DESCRIPTION/TYPE OF PAYMENT TTD BENEFITS 2 WEEKS											
TDISO											
PAY **NINE HUNDRED FORTY-SIX AND .80/100 DOLLARS \$*****946.80											

TO
THE
ORDER
OF

ROBERT J MC CORMICK
C/O CHRIS CALDWELL, ATY AT LAW
P O BOX 607
LEWISTON ID 83501

SUNTRUST
SunTrust Bank of Atlanta
Northwest, GA

PAYEE IRS/SS NO

VOID AFTER
1 YEAR

BY:

Kelly Sullivan
DeSmith

CLIENT FUNDING AUTHORIZATION NO.

NOT VALID WITHOUT SECOND SIGNATURE

⑈86418945⑈ ⑆061100790⑆ 8800600242⑈

*Hand Delivered
to IT 2-19-02
BH*

received
2-19-02 BH

Jew/WAC

AFFIDAVIT OF RONDA K. NICHOLS IN SUPPORT OF MOTION TO
PURSUANT TO IRCP RULE 12(b)(6)

RICHARD WHITEHEAD ISB #2851
WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.
2230 3rd. Ave. N.
P.O. Box 607
Lewiston, ID 83501
Telephone: (208) 743-5299
Facsimile: (208) 743-7432

FILED
2009 AUG 28 PM 12:17

KATHY O. WEEKS
CLERK OF THE DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendant

CASE NO. CV2009-1218

MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS
PURSUANT TO IRCP
RULE 12(b)(6)

Plaintiff filed this lawsuit on June 8, 2009, alleging attorney negligence by Defendants in the representation of Plaintiff with regard to an industrial accident suffered by Plaintiff on April 9, 2001. Plaintiff's lawsuit is not timely and is barred by the applicable Statute of Limitations. The following is a synopsis of Plaintiff's claims as set forth in his Civil Complaint, and relevant undisputed facts.

1. Plaintiff alleges in his Complaint negligence of Defendants arising from the performance of Attorney at Law services performed by Defendants on behalf

of Plaintiff. *See Plaintiff's Civil Complaint, filed June 8, 2009.*

2. Plaintiff alleges in his Complaint that he retained Defendants to represent him with regard to an industrial accident which occurred on or about April 9, 2001. Plaintiff further alleges that Defendants negligently performed those services as Plaintiff's attorney. In particular, Plaintiff alleges that Defendants were negligent in pursuing his workers compensation claim arising from the April 9, 2001, industrial accident. *See Plaintiff's Civil Complaint, filed June 8, 2009.*

3. Plaintiff also alleges that Defendants failed to properly forward to Plaintiff certain benefit checks related to the April 9, 2001 workers compensation claim. Plaintiff alleges that this failure amounted to negligence and amounted to a breach of fiduciary duty owed to him by Defendants. Plaintiff alleges that the checks which he claims were not delivered to him were issued between September 5, 2001, and February 14, 2002. Plaintiff alleges that he suffered damage from these alleged failures beginning on September 19, 2001, with such damage continuing through February 13, 2002. Plaintiff alleges that he had a "discovery" of his damages on March 14, 2008, apparently based upon the issuance of an award check to his mother. *See Plaintiff's Civil Complaint, filed June 8, 2009.*

4. Plaintiff began receiving unemployment compensation benefits beginning March 2, 2002, through August 31, 2002. These unemployment benefits began just two weeks after February 14, 2002, the last date of his Total Temporary Disability Benefit. *See Exhibit 8 to Affidavit of Christopher Caldwell.*

5. Defendants did, in fact, represent Plaintiff with regard to his workers compensation claim arising from an industrial accident of April 9, 2001. During

the course of Defendants representation of Plaintiff, Defendants pursued the matter through litigation, hired and consulted with expert witnesses and presented testimony on Plaintiff's behalf at a workers compensation hearing, including Vocational Counselor Deb Uhlencott, Robert Colburn, MD, and Brett Dirks, MD. In addition, Defendants filed on behalf of Plaintiff various legal briefing, all in conjunction with and in compliance with the Judicial Rules of Practice and Procedure, as adopted by the Idaho Industrial Commission. All benefits which were due Plaintiff were forwarded or caused to be delivered to Plaintiff by Defendants. *See Affidavit of Christopher Caldwell.*

6. On July 27, 2006, the Idaho Industrial Commission rendered a decision on Plaintiff's workers compensation case arising from his industrial injury of April 9, 2001. Said decision awarded to Plaintiff certain benefits due under Title 72 of the Idaho Code. *See Exhibit 2 to Affidavit of Christopher Caldwell.*

7. On August 17, 2006, Defendants, on behalf of Plaintiff, filed a Motion to Reconsider with the Idaho Industrial Commission. On September 26, 2006, the Idaho Industrial Commission denied the Motion to Reconsider and affirmed its earlier findings. *See Exhibit 3 to Affidavit of Christopher Caldwell.*

8. On October 2, 2006, Defendants moved to withdraw as Plaintiff's attorneys. *See Exhibit 5 to Affidavit of Christopher Caldwell.*

9. On October 2, 2006, Defendants filed a Motion for Approval of Attorney Fees Charging Lien. *See Exhibit 4 of Affidavit of Christopher Caldwell.*

10. On December 1, 2006, the Idaho Industrial Commission issued an Order Approving Attorney Lien to Defendants, granting attorney fees of 30% of the

total award to Defendants but reducing reimbursement of litigation costs to Defendants by \$1,000.00. *See Exhibit 4 of Affidavit of Christopher Caldwell.*

11. On December 5, 2006, Plaintiff mailed to the Idaho Industrial Commission a letter, which was filed with the Idaho Industrial Commission on December 6, 2006, wherein he advised that "with regard to his ex-attorney Chris Caldwell" he did not agree that he owed 30% of benefits awarded as an attorney fees but rather 25%, in spite of the fact that Plaintiff agreed by written contract to pay 30% if the matter proceeded to hearing. Plaintiff further advised that that "whatever is owed to Mr. Caldwell will be dealt appropriately." *See Exhibit 7 of Affidavit of Christopher Caldwell.*

12. On December 11, 2006, Defendants were permitted to withdraw, and did in fact withdraw, as Plaintiff's attorneys by Order of the Idaho Industrial Commission. *See Exhibit 6 of Affidavit of Christopher Caldwell.*

13. On December 18, 2006, Defendants filed a Motion to Reconsider with regard to the reimbursement of its litigation costs which had been advanced by Defendants in pursuit of Plaintiff's industrial claims. *See Exhibit 6 of Affidavit of Christopher Caldwell.*

14. On December 20, 2006, Plaintiff wrote a letter to the Idaho Industrial Commission advising that he would represent himself in the matter before the Idaho Industrial Commission arising from his industrial accident of April 9, 2001. *See Exhibit 6 of Affidavit of Christopher Caldwell.*

15. On February 5, 2007, the Idaho Industrial Commission awarded to Defendants an additional \$1,000.00 in litigation cost reimbursement, thus

awarding to Defendants the full amount of litigation costs asserted. *See Exhibit 6 of Affidavit of Christopher Caldwell.*

16. On June 8, 2009, Plaintiff initiated the above-entitled action. *See Plaintiff's Civil Complaint, filed June 8, 2009.*

ARGUMENT

The Statute of Limitations with regard to allegations of professional malpractice, or negligence, are controlled by I.C. Sec. 5-219(4). “An action to recover damages for “professional malpractice” must be commenced within two years after the cause of action has accrued. IC Sec. 5-201 and IC Sec. 5-209. Except for actions based upon leaving a foreign object in a person’s body or where the fact of damage has, for the purpose of escaping responsibility therefor, been fraudulently and knowingly concealed from the injured party, the cause of action for professional malpractice accrues “as of the time of the occurrence, act or omission complained of.” There must also be some damage for the cause of action to accrue. The limitation period is not extended by reason of any continuing consequences or damages resulting from the malpractice or any continuing professional or commercial relationship between the injured party, and the alleged wrongdoing. IC Sec. 5-219.” Lapham v. Stewart, 137 Idaho 582, 585, 586, 51 P.3d 396 (2002).

In the above-captioned matter, Defendants were allowed to and did withdraw as Plaintiff’s attorneys on December 11, 2006. Thereafter, on December 20, 2006, Plaintiff became counsel of record in front of the Idaho Industrial Commission. Acting pro se at that time, Plaintiff had available to him, directly from the Idaho Industrial Commission, all of the filings in the possession of the Idaho Industrial Commission, which include

payout ledgers from the insurance company, along with the decision rendered in his workers compensation claim detailing his entitlement to benefits through May, 2002, along with additional disability.

Any damage that Plaintiff has alleged occurred did so by the date that the Industrial Commission rendered its decision (July 27, 2006). Even assuming *arguendo*, that Plaintiff suffered "some damage" after July 27, 2006, the very latest that the applicable statute of limitations could have begun to run on any action by Plaintiff against Defendants was December 11, 2006, the date the Defendants withdrew as counsel for Plaintiff. Thus, Plaintiff was required to file the above-captioned action, *at the very latest, under any interpretation of the facts*, by December 2008, which he did not do. The above-entitled action was filed on June 8, 2009, at least six months after the Statute of Limitations had run.

In order to benefit from any tolling of the Statute of Limitations, Plaintiff bears the burden of *alleging and proving* facts supporting fraudulent and knowing concealment of issues of damage. See *Lapham at 400, FN3*. Plaintiff has not pled fraudulent and knowing concealment "for the purpose of escaping responsibility therefore" of any issues of damage in this matter, as it is undisputed that no such fraudulent and knowing concealment occurred. In fact, on August 2, 2006, Defendants served by US Mail upon Plaintiff a letter detailing the award of the Idaho Industrial Commission, along with a copy of the decision of the Idaho Industrial Commission. In that letter, Defendants clearly detail the benefits which were awarded to Plaintiff, including entitlement to Total Temporary Disability ("TTD") benefits through May 30, 2002. A review of the decision of the Idaho Industrial Commission further details Plaintiff's entitlement to TTD benefits

through May 30, 2002. While it is clear that Plaintiff endorsed and received the complained of checks, even if someone had forged Plaintiff's endorsement on the checks in issue, Plaintiff became aware, *at the very latest*, shortly after August 2, 2006, that he was entitled to such benefits through May 30, 2002. Even if Plaintiff denies this fact, he should have become aware of any such failure to deliver such checks no later than the time that he appeared pro se in the workers compensation matter on December 20, 2006. Under that analysis, the Statute of Limitations likely ran in August, 2008, but, under any interpretation of the alleged facts, ran no later than December, 2008.

Plaintiff has sought to supply the Court with the returned checks, clearly endorsed by Plaintiff and cashed at the Money Tree, over seven years prior to the date of the Complaint filed in the above-entitled action. And, by virtue of his own allegation as set forth in his Complaint, Plaintiff alleges that he became aware of his injury on March 14, 2008. Assuming *arguendo* that Plaintiff can provide some material facts to prove that late date is, in fact, the first time Plaintiff became aware of such injury and he could prove "fraudulent and knowing concealment for the purpose of escaping responsibility therefore," which he has not plead nor is there any offer of proof of, Plaintiff was obligated to file the above-entitled action by March 14, 2009, which he did not do. *See Ogle v. De Sano*, 107 Idaho 872, 693 P.2d 1074 (1984).

The Court must dismiss Plaintiff's Complaint with prejudice as Plaintiff failed to comply with the applicable Statute of Limitations. Under any interpretation of the facts of this case, the plaintiff failed to file his Complaint in a timely fashion. As such, Plaintiff's complaint fails to state a claim and is subject to dismissal pursuant to IRCP Rule 12(b)(6).

DATED THIS 26 day of August, 2009.



RICHARD WHITEHEAD ISB 2851
Attorney for Defendants

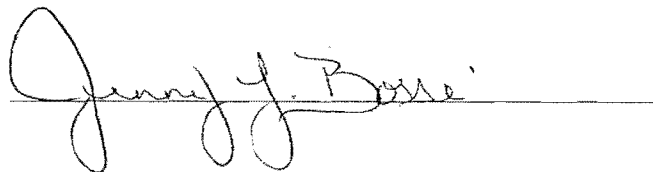
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, by the undersigned this 28th day of August, 2009, to:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

And

DeWayne Shedd
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707



FILED

2009 SEP 4 AM 10 28

RICHARD WHITEHEAD ISB #2851
WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.
2230 3rd Avenue North
Post Office Box 607
Lewiston, ID 83501
Telephone: (208) 743-5299
Facsimile: (208) 743-7432

PATTY WEEKS
CLERK OF THE DISTRICT COURT
Patty Weeks
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendant

CASE NO. CV2009-1218

NOTICE OF HEARING

TO: Plaintiff Robert James McCormack;

AND TO: Clerk of the Court:

PLEASE TAKE NOTICE that Defendants will bring on for hearing the
following motion:

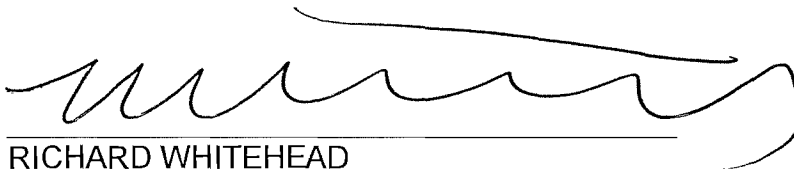
TYPE OF MOTION: Defendants' 12(b)(6) Motion

DATE AND TIME: October 6, 2009 at 9:00 a.m.

LOCATION: Nez Perce County District Court
Nez Perce County Courthouse
Lewiston, Idaho

DATED this 3 day of September, 2009.

WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.



RICHARD WHITEHEAD
Attorney

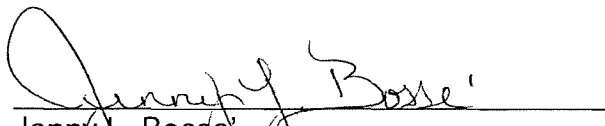
CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of September, 2009, I caused
to be served a true and correct copy of the foregoing via U.S. Mail, postage pre-
paid, to the following:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

And

DeWayne Shedd
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707


Jenny L. Bosse
Litigation Paralegal

FILED

2009 NOV 6 PM 2 19

PATTY O. WEEKS

CLERK OF THE DIST. COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,

Plaintiff,

v.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendants.

CASE NO. CV 08-01218

MEMORANDUM OPINION AND
ORDER ON DEFENDANTS'
MOTION TO DISMISS

This matter came before the Court on the Defendants' Motion to Dismiss Pursuant to IRCP 12(b)(6). The Plaintiff proceeded *pro se* in the matter. The Defendant was represented by Richard Whitehead, of the firm Whitehead, Amberson & Caldwell. The Court heard oral argument on this matter on October 6, 2009. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

BACKGROUND

In April, 2001, the Plaintiff was injured while at work. The Plaintiff was unsatisfied with his worker's compensation coverage for his medical bills, so he hired attorney Christopher Caldwell, of the firm Whitehead, Amberson & Caldwell, to pursue a legal action regarding the worker's compensation claim. Attorney Caldwell and the Plaintiff entered into an Attorney/Client Contract for Workers Compensation on August 20, 2001. *Affidavit of Christopher Caldwell in Support of Defendants' Motion to Dismiss Pursuant to IRCP Rule 12(b)(6), Exhibit 1* (hereinafter "*Affidavit of Christopher Caldwell*"). From September, 2001 through February, 2002, Crawford & Company of Atlanta, Georgia issued checks to Robert J. McCormack, in care of Whitehead, Amberson & Caldwell, for temporary disability benefits (also referred to as "TTD Benefits"). *Affidavit of Ronda K. Nichols in Support of Defendants' Motion to Dismiss Pursuant to IRCP Rule 12(b)(6), Exhibits A-K* (hereinafter "*Affidavit of Ronda K. Nichols*"). On July 27, 2006, the Industrial Commission of the State of Idaho issued a Findings of Fact, Conclusions of Law, and Recommendation which was not favorable to the Plaintiff. *Affidavit of Christopher Caldwell, Exhibit 2*. On December 7, 2006, Attorney Caldwell was permitted to withdraw as attorney of record in the matter before the Idaho Industrial Commission. *Affidavit of Christopher Caldwell, Exhibit 6*.

On June 8, 2009, the Plaintiff filed a civil complaint¹ against both the law firm Whitehead, Amberson & Caldwell and Caldwell personally. The Plaintiff alleges three causes of action for professional negligence resulting from Mr. Caldwell's representation of the Plaintiff for the Plaintiff's worker's compensation claim.

¹ This matter was originally filed on January 28, 2008. See *Nez Perce County Case No. CV-2008-00736*. The case was dismissed without prejudice on April 13, 2009, as a result of the Summons not being properly served on the Defendant.

The Defendants filed a motion to dismiss the claim pursuant to I.R.C.P. 12(b)(6). The Defendants provided supporting documentation in the form of affidavits from Ronda K. Nichols and Christopher Caldwell. In response, the Plaintiff filed an affidavit setting forth the personal knowledge of Robert McCormack.

If a court considers matters outside the pleadings on a motion pursuant to I.R.C.P. 12(b)(6), the court errs if it fails to covert the motion to one for summary judgment. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990). Both parties in the case at hand have submitted information beyond the pleadings, in the form of affidavits, for the Court's consideration on this matter. Consequently, this Court must treat the motion as a motion for summary judgment.²

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether summary judgment is appropriate, the court must construe the pleadings, depositions, admissions, and affidavits in a light most favorable to the nonmoving party. *Conway v. Sonntag*, 141 Idaho 144, 146, 106 P.3d 470, 472 (2005), citing *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002).

When a motion for summary judgment is "supported by a particularized affidavit, the opposing party may not rest upon bare allegations or denials in his pleadings," but must set forth "specific facts" showing a genuine issue. I.R.C.P. 56(e); *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984). A

² Both parties submitted affidavits in support of their argument, which have been reviewed by the Court. Thus, the motion has converted to a motion for summary judgment. The Court considers the matter fully submitted, however, this Court notes it did not advise the parties it was treating the matter as a motion for summary judgment. Consequently, should either party find it necessary to submit additional evidence on the matter, this evidence will be properly considered in a motion for reconsideration.

“mere scintilla” of evidence or only a “slight doubt” as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986), citing *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984); see also *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005).

Finally, the initial burden of establishing the absence of a genuine issue of material fact is on the moving party, and once this burden is met, it is incumbent upon the non-moving party to establish an issue of fact regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

ANALYSIS

The Plaintiff has filed an action against the Defendants to recover damages for claims of professional malpractice. The time limit for filing such an action was discussed in *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009).

“An action to recover damages for ‘professional malpractice’ must be commenced within two years after the cause of action has accrued.” *Lapham v. Stewart*, 137 Idaho 582, 585, 51 P.3d 396, 399 (2002); I.C. §§ 5-201 & 5-219(4). The cause of action for professional malpractice accrues “as of the time of the occurrence, act or omission complained of, and the limitation period shall not be extended by reason of any continuing consequences or damages resulting therefrom or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer.” I.C. § 5-219(4).

Id. at 659, 201 P.3d at 632. In addition, the two year time limitation does not start to run until there is evidence of some damage to the plaintiff.

The statute of limitations for professional malpractice does not begin to run until the plaintiff would have a cause of action against the professional. *Stephens v. Stearns*, 106 Idaho 249, 254, 678 P.2d 41, 46 (1984). Because some damage is required to have a cause of action for negligence, the cause of action cannot accrue until there is some damage. *Id.* “[S]ome damage is required because it would be nonsensical to hold

that a cause of action is barred by the statute of limitations before that cause of action even accrues.” *Lapham v. Stewart*, 137 Idaho 582, 586, 51 P.3d 396, 400 (2002). Negligence that increases the risk that a client will be harmed does not trigger the running of the statute of limitations until harm actually occurs. *Parsons Packing, Inc. v. Masingill*, 140 Idaho 480, 95 P.3d 631 (2004).

Id. at 661, 201 P.3d at 634. However, the limitation period is not extended by reason of any continuing consequences or damages resulting from the malpractice.

Except for actions based upon leaving a foreign object in a person’s body or where the fact of damage has been fraudulently and knowingly concealed, the cause of action for professional malpractice accrues “as of the time of the occurrence, act or omission complained of,” IDAHO CODE § 5-219 (1998), although there must also be some damage for the cause of action to accrue. *Griggs v. Nash*, 116 Idaho 228, 775 P.2d 120 (1989). The limitation period is not extended by reason of any continuing consequences or damages resulting from the malpractice or any continuing professional or commercial relationship between the injured party and the alleged wrongdoer. IDAHO CODE § 5-219 (1998).

Lapham v. Stewart, 137 Idaho 582, 585-586, 51 P.3d 396, 400 (2002).

In order to determine whether the statute of limitations bars the lawsuit before this Court, each cause of action must be considered individually.

A. First Cause of Action

The Plaintiff alleges in the first cause of action that the Defendants failed to provide him with checks dated from September 2001 through February, 2002 for temporary disability benefits. *Civil Complaint*, at 2-3. The Defendants have submitted the Affidavit of Ronda K. Nichols, wherein Ms. Nichols attests that she either hand delivered or mailed to the Plaintiff eleven checks for temporary disability benefits. Ms. Nichols avers that she “caused each of those original checks to be delivered to Plaintiff pursuant to his instructions. At no time did I endorse Plaintiff’s name on the check, nor

did any one else at Whitehead, Amberson & Caldwell, PLLC, endorse Plaintiff's name on the check." *Affidavit of Ronda K. Nichols*, at 7.

In response, the Plaintiff argues he did not receive the checks, and had no knowledge of the checks until he received bank records from an individual at the Department of Insurance in December, 2008. *Affidavit of Robert J. McCormack in Support of Opposition to Defendants' Motion to Dismiss Pursuant to IRCP 12(b)(6)*, at 3 (hereinafter "*Affidavit of Robert J. McCormack*"). The Plaintiff also provides the Court with copies of checks from May, 2001 through August, 2001, which were cashed at Bank of America. *Affidavit of Robert J. McCormack, Exhibit C-H*.

The record indicates that the Industrial Commission referred to the Plaintiff's recovery of temporary disability benefits (TTD benefits) within the Commission's Findings of Fact, Conclusions of Law, and Recommendation filed July 27, 2006. The Commission's findings state that "Claimant is entitled to TTD benefits through May 30, 2002." *Findings of Fact, Conclusions of Law, and Recommendation*, at 8. Therefore, construing the facts in favor of the Plaintiff, the Plaintiff should have been aware by July 27, 2006 that he was entitled to temporary disability benefits during the time frame he claims the Defendants failed to provide him with the checks.

In addition, the Defendant also informed the Plaintiff that he was only awarded temporary disability benefits through May 30, 2002 in a letter to the Plaintiff dated August 2, 2006. *Affidavit of Christopher Caldwell, Exhibit 3*. This letter confirmed the findings of the Industrial Commission and further informed the Plaintiff of the time frame he received temporary disability benefits.

The Plaintiff does not refute the statements within the letter, nor does the Plaintiff assert that he was not aware that he received temporary disability benefits through May, 2002. At summary judgment, the Court must construe the pleadings, depositions, admissions, and affidavits in a light most favorable to the nonmoving party. However, the opposing party may not rest upon bare allegations or denials in his pleadings," but must set forth "specific facts" showing a genuine issue. I.R.C.P. 56(e); *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984). A "mere scintilla" of evidence or only a "slight doubt" as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equipment Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986).

The record before this Court indicates that the Plaintiff acknowledges the receipt of eight checks for temporary disability payments from May, 2001 through August, 2001. The Plaintiff claims he did not receive checks from September, 2001 through February, 2002. It is not likely that the Plaintiff would not have been aware that he continued to be paid temporary disability benefits during this time frame. However, construing the facts in a light most favorable to the Plaintiff, it is certain the Plaintiff was informed that he was eligible for temporary disability benefits through May, 2002 within the Industrial Commission's Findings of Facts, Conclusions of Law, and Recommendation dated July 27, 2006;. The information within this document effectively put the Plaintiff on notice about the claimed missed payments. Further, the Plaintiff was informed regarding his temporary disability benefits in a letter from counsel dated August 2, 2006.

When considering the facts presented to the Court in a light most favorable to the Plaintiff, it is undisputed that the Plaintiff was informed about his temporary disability

benefits by July 27, 2006. The lawsuit in question was filed on June 8, 2009, well beyond the two year statute of limitations for a cause of action for professional malpractice.³ Therefore, the first count of the complaint is dismissed for failure to comply with the statute of limitations.

B. Second cause of action

The second cause of action in the case at hand is identical to the first cause of action. The Plaintiff claims damages as a result of the failure to receive temporary disability checks. The second cause of action lists claims for damages as a result of the missing money. These claims are dated from October, 2001 through February, 2002.

Based upon the claims of the Plaintiff, the damage in question occurred by February, 2002.

Because some damage is required to have a cause of action for negligence, the cause of action cannot accrue until there is some damage. *Id.* “[S]ome damage is required because it would be nonsensical to hold that a cause of action is barred by the statute of limitations before that cause of action even accrues.” *Lapham v. Stewart*, 137 Idaho 582, 586, 51 P.3d 396, 400 (2002). Negligence that increases the risk that a client will be harmed does not trigger the running of the statute of limitations until harm actually occurs. *Parsons Packing, Inc. v. Masingill*, 140 Idaho 480, 95 P.3d 631 (2004).

City of McCall v. Buxton, 146 Idaho at 661, 201 P.3d at 634. Based upon the claims set forth by the Plaintiff, the last date of claimed damages occurred in February, 2002. This date is well beyond the two year statute of limitations as set forth in I.C. § 5-219(4).

³ The Plaintiff incorrectly asserts that the Complaint dated June 8, 2009 is simply an Amended Complaint. The Plaintiff asserts the case was filed on January 28, 2008, which would have been within the time frame for the statute of limitations in this case. The Court notes that the first complaint filed by the Plaintiff was dismissed without prejudice due to the Plaintiff's failure to affect service upon the Defendant. “This Court adheres to the rule that persons acting *pro se* are held to the same standards and rules as those represented by attorneys.” *Watkins v. Peacock*, 145 Idaho 704, 707, 184 P.3d 210, 213 (2008). Thus, it is necessary to clarify that the new complaint filed on June 8, 2009 is not simply an amended complaint. The two year time frame is established by the June 8, 2009 date of filing.

In addition, the analysis of the first cause of action is also applicable to the second cause of action. Both claims are as a result of Plaintiff's contention he did not receive disability checks. Consequently, the second cause of action must be dismissed because it is time barred by the two year statute of limitations.

C. Third cause of action

The third cause of action claims damages as a result of the Defendant's mishandling of the Plaintiff's vocational rehabilitation counselor for purposes of the hearing before the Industrial Commission. As stated above, the Industrial Commission released its Findings of Fact, Conclusions of Law, and Recommendation filed July 27, 2006. Within the Findings of Fact, Conclusions of Law, and Recommendation the Industrial Commission hearing officer makes the determination which initiated Plaintiff's claim: "Here, Claimant retained a vocational expert at the 11th hour to generate a disability analysis." *Affidavit of Christopher Caldwell, Exhibit 2.*

The Plaintiff failed to file suit within two years from the date that he became aware of this cause of action, July 27, 2006. Therefore, the Plaintiff's third cause of action is dismissed for failure to comply with the statute of limitations.

CONCLUSION

The Defendants argue this matter should be dismissed because the Plaintiff failed to comply with the applicable statute of limitations. The applicable statute of limitations requires a party to file suit within two years after the cause of action has accrued. The Plaintiff failed to file suit within the two year time frame, thus the Defendants' motion to dismiss the matter with prejudice is granted.

ORDER

The Defendants' motion to dismiss the pending lawsuit for failure to file the matter within the time frame allotted by the statute of limitations is hereby GRANTED.

The lawsuit is dismissed WITH PREJUDICE.

IT IS SO ORDERED.

Dated this 16th day of November 2009.



CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON DEFENDANTS' MOTION TO DISMISS was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 10 day of November, 2009, on:

Robert James McCormack
South Idaho Correctional Institution
P O Box 8509 N.D. A-29
Boise ID 83707

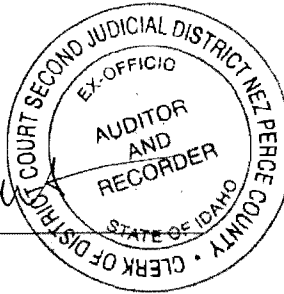
DeWayne Shedd
South Idaho Correctional Institution
P O Box 8509 N.D. A-29
Boise ID 83707

Richard Whitehead
WHITEHEAD AMBERSON & CALDWELL
P o Box 607
Lewiston ID 83501

PATTY O. WEEKS, CLERK

By:


Deputy



FILED
2009 NOV 23 PM 2 50

PATTY O. WELLS
CLERK OF THE DISTRICT COURT
DEPUTY
[Signature]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,

Plaintiff,

v.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendants.

CASE NO. CV 09-01218

ORDER DENYING MOTION
FOR APPOINTMENT OF
COUNSEL

IT IS HEREBY ORDERED that the Plaintiff's Motion for Appointment of
Counsel is denied.

Dated this 23rd day of November 2009.

[Signature]
CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL was:

_____ faxed this _____ day of November, 2009, or

_____ hand delivered via court basket this _____ day of November, 2009, or

X mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 23rd day of November, 2009, to:

Robert James McCormack
South Idaho Correctional Institution
P.O. Box 8509 N.D. A-29
Boise, ID 83707

Carolyn Puckett
South Idaho Correctional Institution
P.O. Box 8509 N.D. A-29
Boise, ID 83707

Richard Whitehead
Whitehead Amberson & Caldwell
P.O. Box 607
Lewiston, ID 83501

PATTY O. WEEKS, CLERK

By: _____

Deputy



ORDER DENYING MOTION FOR
APPOINTMENT OF COUNSEL

FILED

2009 NOV 25 AM 11 30

RICHARD WHITEHEAD ISB #2851

WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C. CLERK OF THE DIST. COURT

2230 3rd. Ave. N.

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Facsimile: (208) 743-7432

PATTY O. WEEKS

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendant

CASE NO. CV2009-1218

MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION
TO RECONSIDER

Plaintiff has filed a Motion to Reconsider asking this Court to reconsider its Memorandum Opinion and Order on Defendants' Motion to Dismiss. In his Motion to Reconsider, Plaintiff attaches Exhibits A-1, A-2, A-3, and A-4. While Defendants object to the inclusion of Exhibits A-1 in the Courts deliberation of this matter having not been attested to in any way, Defendants note that A-1 is a letter wherein Plaintiff requested a copy of his file from Defendants' office, A-2 was previously attached to Affidavit of Robert J. McCormack in Support of Opposition to Defendants' motion to Dismiss

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO
RECONSIDER

Pursuant to IRCP Rule 12(b)(6) previously filed in this cause, A-3 is the first page of a lawsuit previously filed but later dismissed by the Court, and A-4 is a case determining applicable statute of limitations with regard to negligence of attorneys pursuant to the laws of the Commonwealth of the Northern Mariana Islands.

Plaintiff has presented no new substantive evidence to the Court. Plaintiff's previously presented argument concerning Exhibit A-2, and by reference, A-1 in his Affidavit of Robert J. McCormack in Support of Opposition to Defendants' Motion to Dismiss. Exhibit A-3 is a prior lawsuit which was dismissed and has no relevance to the above-captioned cause, and again was the subject of argument previously by Plaintiff. Exhibit A-4 is an appellate decision interpreting the laws of the Commonwealth of the Northern Mariana Islands, not Idaho.

With regard to the First and Second Causes of Action of Plaintiff's claims, the Court found that Plaintiff should have been aware of his entitlement to TTD benefits by July 27, 2006. In fact, Plaintiff has now admitted that he received and was, in fact, aware of the Industrial Commissions decision dated July 27, 2006, and that he received the correspondence of counsel (*Affidavit of Christopher Caldwell, Exhibit 3*) shortly after August 2, 2006, detailing his entitlement to various workers compensation benefits. (*See Motion for Reconsideration, p. 3*).

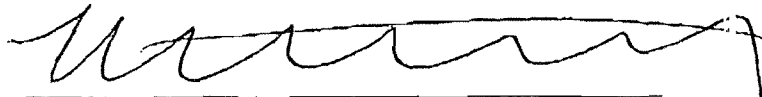
Plaintiff also argues that he had "no way of discovering damages before March 14, 2008, date of last check mailed to plaintiff's Mother, Marciline Meza." *See Motion for Reconsideration p. 4*. In addition to having been aware of his entitlement to TTD benefits by July 27, 2006, it is uncontested that Plaintiff on December 20, 2006, wrote a letter to the Idaho Industrial Commission advising that he would represent himself in the

matter before the Idaho Industrial Commission arising from his industrial accident of April 9, 2001. See Exhibit '6' of Affidavit of Christopher Caldwell.

Defendants would further note that Plaintiff previously asserted that he had no knowledge of his allegedly "missing" TTD checks until December, 2008. See *Memorandum Opinion and Order on Defendant's Motion to Dismiss*, p. 6. Plaintiff now asserts that he discovered the alleged "missing checks" on October 31, 2008, some two months prior to what was previously provided to the Court in a sworn affidavit. Plaintiff filed this lawsuit on June 8, 2009, alleging attorney negligence by Defendants in the representation of Plaintiff, well after the two year Statute of Limitations. Plaintiff's lawsuit is not timely and is barred by the applicable Statute of Limitations. Plaintiff's Motion for Reconsideration should be denied, and the Court previous ruling dismissing Plaintiff's lawsuit with prejudice affirmed.

Defendants further request that Plaintiff's request for oral argument on this Motion be denied pursuant to IRCP 7(b)(3)(D).

DATED THIS 25 day of November, 2009.



RICHARD WHITEHEAD ISB 2851
Attorney for Defendants

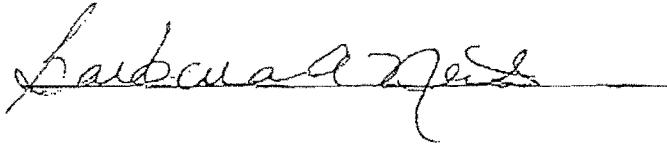
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, by the undersigned this 25 day of November, 2009, to:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

And

DeWayne Shedd
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707



FILED

2009 DEC 9 PM 12 04

RICHARD WHITEHEAD ISB #2851
 WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.
 2230 3rd. Ave. N.
 P.O. Box 607
 Lewiston, ID 83501
 Telephone: (208) 743-5299
 Facsimile: (208) 743-7432

PATTY O. WEEKS

CLERK OF THE DIST. COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
 WHITEHEAD, AMBERSON &
 CALDWELL, PLLC,

Defendant

CASE NO. CV2009-1218

MOTION TO STRIKE
 SUPPLEMENTAL AFFIDAVIT OF
 MOTION TO RECONSIDER

On or about November 16, 2009, Plaintiff filed a Motion for Reconsideration wherein he re-submitted arguments and unsupported allegations to the Court. In response, Defendants filed a Memorandum in Opposition to Plaintiff's Motion to Reconsider. Now, Plaintiff has filed a Supplemental Affidavit of Motion to Reconsider, an affidavit in support of his Motion to Reconsider.

Plaintiff's Affidavit violates IRCP Rule 7(b)(3)(B). IRCP Rule 7(b)(3)(B) states that "When a motion is supported by affidavit(s), the affidavit(s) *shall* be served with the MOTION TO STRIKE SUPPLEMENTAL AFFIDAVIT OF MOTION TO RECONSIDER

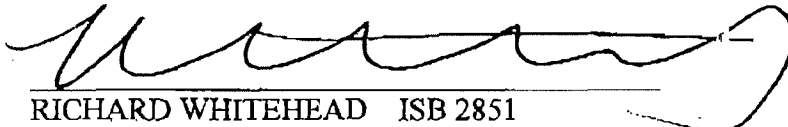
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136

motion." (Emphasis added). Plaintiff was required to file any such affidavit with his Motion to Reconsider, which he did not do. As Plaintiff noted in his Motion for Reconsideration, "Plaintiff acting pro-se understands the rules." Plaintiff's Supplemental Affidavit of Motion to Reconsider must be stricken.

Defendants' request that Plaintiff's Supplemental Affidavit of Motion to Reconsider be stricken and the Court's previous Memorandum Opinion and Order dismissing Plaintiff's lawsuit with prejudice be affirmed.

DATED THIS 8 day of December, 2009.



RICHARD WHITEHEAD ISB 2851
Attorney for Defendants

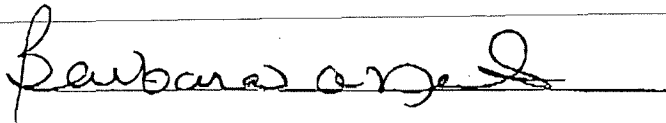
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, by the undersigned this 9th day of December, 2009, to:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

And

DeWayne Shedd
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707



MOTION TO STRIKE SUPPLEMENTAL AFFIDAVIT OF MOTION TO
RECONSIDER

2

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FILED

2009 DEC 11 PM 12 14

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendants.

CASE NO. CV-09-01218

ORDER SETTING HEARING

IT IS HEREBY ORDERED that the above-entitled case be set for a hearing on Plaintiff's Motion to Reconsider on Tuesday the 19th day of January, 2010, at the hour of 9:00 a.m. at the Nez Perce County Courthouse, Lewiston, Idaho.

DATED this 11th day of December, 2009.


CARL B. KERRICK-District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER SETTING HEARING was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 11th day of December, 2009, on:

Robert James McCormack
South Idaho Correctional Institution
P.O. Box 8509 N.D. A-29
Boise, ID 83707

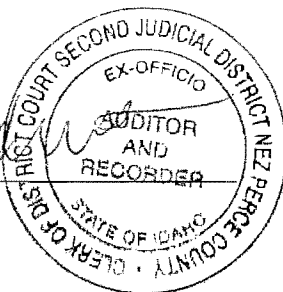
Carolyn Puckett
South Idaho Correctional Institution
P.O. Box 8509 N.D. A-29
Boise, ID 83707

Richard Whitehead
Whitehead Amberson & Caldwell
P.O. Box 607
Lewiston, ID 83501

PATTY O. WEEKS, CLERK

By:

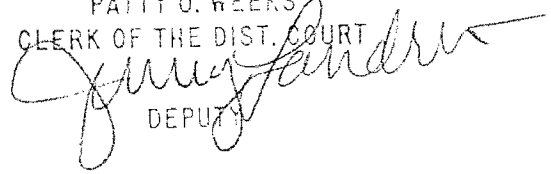
[Signature]
Deputy



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2010 JAN 15 PM 3 06

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendants.

CASE NO. CV-09-01218

AMENDED

ORDER SETTING HEARING

IT IS HEREBY ORDERED that the above-entitled case be set for a telephonic hearing on Plaintiff's Motion to Reconsider on Tuesday, the 2nd day of February, 2010, at the hour of 9:00 a.m. at the Nez Perce County Courthouse, Lewiston, Idaho.

Court will initiate the call to the plaintiff at (208)336-1260 ext. 5202 and to Mr. Whitehead at (208)765-5291.

DATED this 15th day of January, 2010.



CARL B. KERRICK-District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing AMENDED ORDER SETTING HEARING was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 15th day of January, 2010, on:

Robert James McCormack
South Idaho Correctional Institution
P.O. Box 8509 N.D. A-29
Boise, ID 83707

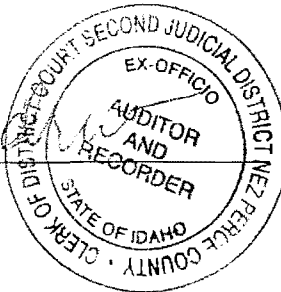
Carolyn Puckett
South Idaho Correctional Institution
P.O. Box 8509 N.D. A-29
Boise, ID 83707

Richard Whitehead
Whitehead Amberson & Caldwell
P.O. Box 607
Lewiston, ID 83501

PATTY O. WEEKS, CLERK

By: 

Deputy



FILED**2010 FEB 9 PM 3 30**

RICHARD WHITEHEAD ISB #2851
 WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.
 2230 3rd. Ave. N.
 P.O. Box 607
 Lewiston, ID 83501
 Telephone: (208) 743-5299
 Facsimile: (208) 743-7432

PATTY O. WEEKS

CLERK OF THE DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,

Plaintiff,

vs.

CHRISTOPHER E. CALDWELL and
 WHITEHEAD, AMBERSON &
 CALDWELL, PLLC,

Defendants

CASE NO CV2009-1218

MOTION TO STRIKE
 PLAINTIFF'S MOTION TO
 RECONSIDER,
 FURTHER INFORMATION,
 REQUEST FOR ORAL
 ARGUMENT

On or about February 3, 2010, Plaintiff filed a Motion for Reconsideration,
 Further Information, Request for Oral Argument wherein he requests that the Court "look
 further into his recommendations of reconsideration," apparently referring to Plaintiff's
 Motion to Reconsider filed on November 16, 2009. Said Motion for Reconsideration is
 not timely, is redundant and immaterial. Plaintiff was required to file such a Motion for

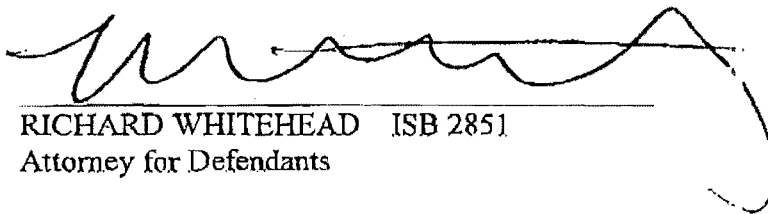
MOTION TO STRIKE PLAINTIFF'S MOTION TO RECONSIDER, FURTHER
 INFORMATION, REQUEST FOR ORAL ARGUMENT

1

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Reconsideration within 14 days of November 6, 2009, the date this Court dismissed Plaintiff's complaint. (IRCP Rule 11(a)(2)(B)) Plaintiff has failed to meet such a deadline. Further, IRCP Rule 11(a)(2)(B) does not allow or contemplate the filing of multiple Motions to Reconsider on a particular issue.

DATED THIS 10 day of February, 2010.



RICHARD WHITEHEAD ISB 2851
Attorney for Defendants

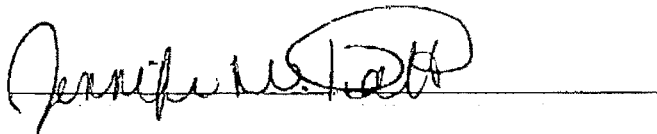
CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, by the undersigned this 9 day of February, 2010 to:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

And

DeWayne Shedd
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707



FILED

2010 MAR 1 PM 2 23

PATTY O. WEEKS
CLERK OF THE DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,

Plaintiff,

v.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendants.

CASE NO. CV 09-01218

MEMORANDUM OPINION AND
ORDER ON PLAINTIFF'S
MOTION TO RECONSIDER

This matter came before the Court on the Plaintiff's Motion to Reconsider the Memorandum Decision and Order on Defendants' Motion to Dismiss dated November 6, 2009. The Plaintiff proceeded *pro se* in the matter. The Defendant was represented by Richard Whitehead, of the firm Whitehead, Amberson & Caldwell. The matter was set for oral argument on February 2, 2010; however, the Plaintiff was unavailable¹ for the

¹ The Plaintiff is currently incarcerated, thus, telephonic hearings must be scheduled through the Idaho Department of Corrections. Arrangements were made through the Department for purposes of holding a hearing on this matter. The Court attempted to make contact with the Plaintiff by the number provided by the Department; however, Court was unable to reach the Plaintiff via the phone number supplied. The Court notes that the Plaintiff was unavailable for the hearing through no fault of his own.

hearing. The Court, having considered the filings by the parties and being fully advised in the matter, hereby renders its decision.

BACKGROUND

Comprehensive background details of the lawsuit are available in the Court's *Memorandum Opinion and Order on Defendants' Motion to Dismiss*, dated November 6, 2009. This Court concluded that the Plaintiff failed to comply with the applicable statute of limitations and the lawsuit was dismissed with prejudice.

The Plaintiff filed a motion for reconsideration on November 19, 2009. The Defendants filed a memorandum in opposition on November 25, 2009. On December 4, 2009, the Plaintiff filed a Supplemental Affidavit of Motion to Reconsider, to which the Defendants responded with a motion to strike.

The matter was set for argument on February 2, 2010. Counsel for Defendants was present telephonically, however, the Plaintiff was absent from the hearing following numerous attempts by the Court to contact the Plaintiff telephonically. As a result, the Court reviewed the documents submitted and found that the matter was properly submitted on the briefing and supporting documents filed, thus making it unnecessary to schedule another hearing on the matter. The Plaintiff was informed of this decision and elected to file further information in support of the motion to reconsider.

On February 3, 2010, the Plaintiff filed a Motion to Reconsider, Further Information, Request for Oral Argument. The Defendants responded with a motion to strike the Plaintiff's motion, arguing the motion was not timely, redundant, and immaterial.

ANALYSIS

This matter was set for argument on February 2, 2010. The Plaintiff, through no fault of his own, was unable to be present at that time, thus, oral argument was not had on the matter. I.R.C.P. 7(b)(3)(D) permits the Court to “deny oral argument by counsel by written or oral notice to all counsel before the day of the hearing, and the court may limit oral argument at any time.” The Court attempted to contact the Plaintiff at the scheduled hearing time; however, the Court was unable to reach the Plaintiff at the number provided. Having failed to contact the Plaintiff, notice was given to the Plaintiff that the Court would consider the matter submitted on the record before it. The Plaintiff submitted additional material, thus the matter is fully submitted upon the briefs and supporting documents filed by the parties.

On November 6, 2009, the Defendant’s motion to dismiss this lawsuit was granted, based upon this Court’s determination that the lawsuit was not filed within the two year statute of limitations, as set forth in I.C. §§ 5-201 and 5-219(4). *See also City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009). The Court reviewed every claim set forth by the Plaintiff within the Court’s *Memorandum Opinion and Order on Defendants’ Motion to Dismiss* and determined that the Plaintiff failed to comply with the applicable statute of limitations.

After due consideration of all additional filings in this matter, this Court finds the Plaintiff has presented no new substantive evidence to the Court. The Plaintiff failed to file suit within the two year time frame required by the applicable statute of limitations. Accordingly, the Plaintiff’s motion for reconsideration is denied.

ORDER

The Plaintiff's Motion for Reconsideration of the Court's Memorandum Opinion and Order on Defendants' Motion to Dismiss filed on November 6, 2009, is hereby DENIED.

IT IS SO ORDERED.

Dated this 1st day of March 2010.



CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION TO RECONSIDER was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 5th day of March, 2010, on:

Robert James McCormack
South Idaho Correctional Institution
P O Box 8509 N.D. A-29
Boise ID 83707

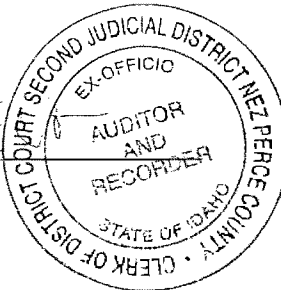
Carolyn Puckett
South Idaho Correctional Institution
P O Box 8509 N.D. A-29
Boise ID 83707

Richard Whitehead
WHITEHEAD AMBERSON & CALDWELL
P o Box 607
Lewiston ID 83501

PATTY O. WEEKS, CLERK

By:

[Signature]
Deputy



FILED ORIGINAL

2010 MAR 11 AM 10 07

Inmate name Robert McCormack

IDOC No. 32935

Address S.I.C.L.N.D.-A-4 P.O. Box 8509

BOISE, IDAHO 83707

PAUL J. O'NEILL
CLERK OF THE DISTRICT COURT

Deanne D. Gunn

DEPUTY

Defendant/Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT MCCORMACK)

Appellant,)

vs.)

CHRISTOPHER CALDWELL and)

Respondent.)

WHITE HEAD, AMBERSON & CALDWELL, PLLC)

Case No. CV09-01218

NOTICE OF APPEAL

TO: THE ABOVE RESPONDENTS, CHRISTOPHER CALDWELL,
AND THE PARTY'S ATTORNEYS, RICHARD WHITE HEAD
AND THE CLERK OF THE ABOVE ENTITLED
COURT:

NOTICE IS HEREBY GIVEN THAT

1. The above named Appellant(s) ROBERT MCCORMACK
appeal(s) against the above named respondent(s) to the Idaho Supreme Court from (the final
judgment or order, (describe it) _____

entered in the above-entitled action (proceeding) on the ____ day of _____,

20____, Honorable Judge _____ presiding.

NOTICE OF APPEAL - 1

Revised: 10/14/05

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgment or orders described in paragraph 1 above are appealable orders under and pursuant to Rule _____ [e.g. (11(c)(1)), or (12(a))] I.A.R.

3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.

1. Did the Court error in dismissing case based on Plaintiff's improper statute citing.
2. Did the Court error in failing to reconsider (I.R.C.P. (15a))
3. Did the Court error in failing recognize complaint of fraud, as criminal.
4. The Court did not construe complaint liberally.

4.(a) Is a reporter's transcript requested? Yes.

(b) The appellant requests the preparation of the following portions of the reporter's transcript:

- ☒ The entire reporter's standard transcript as defined in Rule 25(a), I.A.R.

☐ The entire reporter's transcript supplemented by the following:

☐ Voir Dire examination of jury

☐ Closing arguments of counsel

☐ The following reporter's partial transcript: _____

☐ The testimony of witness(es) _____

☐ Conferences on requested instructions

☐ Instructions verbally given by court

5. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.

☐ All requested and given jury instructions

☐ The deposition of: _____

☐ Plaintiff's motion for continuance of trial

6. I certify:

(a) That a copy of this notice of appeal has been served on the reporter.

(b)(1) ☐ That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(2) ☒ That the appellant is exempt from paying the estimated transcript fee because

In prison and lacks funding

(c)(1) ☐ That the estimated fee for preparation of the clerk or agency's record has been paid.

(2) ☒ That the appellant is exempt from paying the estimated fee for the preparation of the record because Is in prison without funds

(d)(1) ☐ That the appellate filing fee has been paid.

(2) ☒ That appellate is exempt from paying the appellate filing fee because In prison - funds

(e) That service has been made upon all parties required to be served pursuant to Rule 20, and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.

DATED THIS 8 day of MARCH, 2010.

Robert McCormack
Appellant

STATE OF IDAHO)
) ss
County of Ada)

Robert McCormack, being sworn, deposes and says:

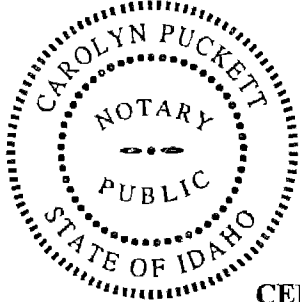
That the party is the appellant in the above-entitled appeal and that all statements in this notice of appeal are true and correct to the best of his or her knowledge and belief.

[Signature]
Appellant

SUBSCRIBED AND SWORN to before me this 6 day of MARCH,

2010.

(SEAL)



[Signature]
Notary Public for Idaho
Commission expires: 2-17-15

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on the 6 day of MARCH, 2010, I mailed a true and correct copy of the NOTICE OF APPEAL via prison mail system for processing to the U.S. mail system to:

**OFFICE OF THE ATTORNEY GENERAL
CRIMINAL DIVISION, APPELLATE UNIT
PO Box 87320
Boise, ID 83720-0010**

RICHARD WHITEHEAD County Prosecuting Attorney

Whitehead, Amberson & Caldwell - P.O. Box 607

LEWISTON, IDAHO, 83501

[Signature]
Appellant

ORIGINAL

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 03/08/2010 =

Doc No: 32935 Name: MCCORMACK, ROBERT J
Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL
TIER-A CELL-1

Transaction Dates: 03/08/2009-03/08/2010

Beginning	Total	Total	Current
Balance	Charges	Payments	Balance
81.18	3004.18	3027.02	104.02

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
03/01/2010	SI0490924-010	070-PHOTO COPY	83948	0.20DB	35.24
03/03/2010	II0491215-007	072-METER MAIL	83976	2.27DB	32.97
03/04/2010	SI0491295-071	099-COMM SPL		22.15DB	10.82
03/04/2010	SI0491295-072	099-COMM SPL		6.80DB	4.02
03/08/2010	HQ0491692-011	011-RCPT MO/CC	MAIL	100.00	104.02

I hereby certify that these records are true and correct copies of official
records or reports or entries therein of the Idaho Department of Correction

Dated: 3-8-10

Signature: 

= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 03/08/2010 =

Doc No: 32935 Name: MCCORMACK, ROBERT J
Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL
TIER-A CELL-1

Transaction Dates: 03/08/2009-03/08/2010

Beginning Balance	Total Charges	Total Payments	Current Balance
81.18	3004.18	3027.02	104.02

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
12/17/2009	SI0482818-074	099-COMM SPL		21.58DB	17.51
12/18/2009	SI0483033-006	070-PHOTO COPY	82865	0.35DB	17.16
12/22/2009	SI0483377-063	099-COMM SPL		6.80DB	10.36
12/30/2009	SI0484225-068	099-COMM SPL		10.20DB	0.16
01/05/2010	II0484658-058	072-METER MAIL	83380	1.90DB	1.74DB
01/11/2010	SI0485550-003	070-PHOTO COPY	83381	3.40DB	5.14DB
01/12/2010	HQ0485646-007	011-RCPT MO/CC	MAIL	100.00	94.86
01/13/2010	II0485889-015	072-METER MAIL	81260	3.05DB	91.81
01/14/2010	II0485981-028	072-METER MAIL	83519	0.88DB	90.93
01/14/2010	SI0485993-078	099-COMM SPL		11.51DB	79.42
01/14/2010	SI0485993-079	099-COMM SPL		10.20DB	69.22
01/21/2010	SI0486591-072	099-COMM SPL		13.91DB	55.31
01/21/2010	SI0486591-073	099-COMM SPL		17.81DB	37.50
01/25/2010	SI0486948-005	070-PHOTO COPY	83594	0.10DB	37.40
01/25/2010	SI0486948-012	070-PHOTO COPY	83585	2.20DB	35.20
01/25/2010	SI0486948-019	070-PHOTO COPY	83632	0.30DB	34.90
01/25/2010	HQ0486960-012	061-CK INMATE	81350	0.25DB	34.65
01/28/2010	SI0487399-059	099-COMM SPL		15.08DB	19.57
01/28/2010	SI0487399-060	099-COMM SPL		6.80DB	12.77
02/01/2010	SI0487824-011	070-PHOTO COPY	83663	2.80DB	9.97
02/02/2010	HQ0487861-001	011-RCPT MO/CC	MAIL	100.00	109.97
02/03/2010	II0488069-059	072-METER MAIL	83660	3.02DB	106.95
02/04/2010	SI0488224-070	099-COMM SPL		3.40DB	103.55
02/05/2010	II0488434-046	072-METER MAIL	83691	2.10DB	101.45
02/09/2010	SI0488819-003	070-PHOTO COPY	83681	0.40DB	101.05
02/09/2010	SI0488819-011	070-PHOTO COPY	83695	1.40DB	99.65
02/11/2010	SI0489200-082	099-COMM SPL		12.46DB	87.19
02/11/2010	SI0489200-083	099-COMM SPL		10.20DB	76.99
02/16/2010	SI0489570-006	070-PHOTO COPY	83700	0.60DB	76.39
02/17/2010	II0489654-040	072-METER MAIL	83913	3.12DB	73.27
02/18/2010	SI0489827-069	099-COMM SPL		10.76DB	62.51
02/18/2010	SI0489827-070	099-COMM SPL		6.80DB	55.71
02/22/2010	SI0490138-001	070-PHOTO COPY	83912	5.05DB	50.66
02/22/2010	SI0490138-007	070-PHOTO COPY	83897	1.20DB	49.46
02/22/2010	SI0490206-004	100-CR INM-CMM		10.76	60.22
02/23/2010	SI0490336-014	071-MED CO-PAY	339177	7.00DB	53.22
02/25/2010	SI0490576-081	099-COMM SPL		10.20DB	43.02
02/25/2010	SI0490576-082	099-COMM SPL		6.36DB	36.66
02/26/2010	II0490736-025	072-METER MAIL	83959	1.22DB	35.44

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= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 03/08/2010 =

Doc No: 32935 Name: MCCORMACK, ROBERT J
Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL
TIER-A CELL-1

Transaction Dates: 03/08/2009-03/08/2010

Beginning Balance 81.18	Total Charges 3004.18	Total Payments 3027.02	Current Balance 104.02
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===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance

03/11/2009	II0451627-008	072-METER MAIL	55530	1.17DB	80.01
03/12/2009	SI0451808-097	099-COMM SPL		10.20DB	69.81
03/12/2009	SI0451808-098	099-COMM SPL		11.02DB	58.79
03/19/2009	HQ0452330-005	011-RCPT MO/CC	MAIL	100.00	158.79
03/26/2009	SI0453132-076	099-COMM SPL		34.47DB	124.32
03/26/2009	SI0453132-077	099-COMM SPL		10.20DB	114.12
03/31/2009	II0453594-010	072-METER MAIL	78640	4.19DB	109.93
04/09/2009	SI0454796-106	099-COMM SPL		13.60DB	96.33
04/09/2009	SI0454796-107	099-COMM SPL		27.67DB	68.66
04/15/2009	II0455435-029	072-METER MAIL	78669	1.18DB	67.48
04/16/2009	SI0455594-093	099-COMM SPL		17.00DB	50.48
04/16/2009	SI0455594-094	099-COMM SPL		29.18DB	21.30
04/20/2009	HQ0455788-006	011-RCPT MO/CC	MAIL	1939.00	1960.30
04/20/2009	SI0455816-003	070-PHOTO COPY	78668	1.80DB	1958.50
04/20/2009	SI0455816-007	070-PHOTO COPY	78639	6.15DB	1952.35
04/23/2009	SI0456320-092	099-COMM SPL		43.04DB	1909.31
04/23/2009	SI0456320-093	099-COMM SPL		17.62DB	1891.69
04/27/2009	HQ0456508-011	061-CK INMATE	74226	500.00DB	1391.69
04/27/2009	HQ0456508-012	061-CK INMATE	55528	500.00DB	891.69
04/30/2009	SI0456951-093	099-COMM SPL		27.91DB	863.78
04/30/2009	SI0456951-094	099-COMM SPL		28.68DB	835.10
05/07/2009	SI0457935-104	099-COMM SPL		26.32DB	808.78
05/07/2009	SI0457935-105	099-COMM SPL		15.22DB	793.56
05/11/2009	SI0458258-003	100-CR INM CMM		10.60	804.16
05/13/2009	II0458522-022	072-METER MAIL	78699	2.07DB	802.09
05/14/2009	SI0458603-104	099-COMM SPL		133.60DB	668.49
05/14/2009	SI0458603-105	099-COMM SPL		19.66DB	648.83
05/15/2009	II0458796-001	072-METER MAIL	16659	0.02DB	648.81
05/18/2009	II0458916-004	072-METER MAIL	74602	1.22DB	647.59
05/21/2009	SI0459333-099	099-COMM SPL		13.60DB	633.99
05/22/2009	SI0459538-001	070-PHOTO COPY	16658	0.30DB	633.69
05/22/2009	SI0459538-004	070-PHOTO COPY	16672	9.90DB	623.79
05/22/2009	II0459542-017	072-METER MAIL	16674	5.02DB	618.77
05/26/2009	II0459641-001	072-METER MAIL	74008	2.58DB	616.19
05/27/2009	SI0459721-004	100-CR INM CMM		116.60	732.79
05/28/2009	SI0459865-076	099-COMM SPL		25.29DB	707.50
05/28/2009	SI0459865-077	099-COMM SPL		13.60DB	693.90
06/03/2009	II0460613-009	072-METER MAIL	52849	6.38DB	687.52
06/03/2009	HQ0460670-003	061-CK INMATE	52856	88.00DB	599.52

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= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 03/08/2010 =

Doc No: 32935 Name: MCCORMACK, ROBERT J
Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL
TIER-A CELL-1

Transaction Dates: 03/08/2009-03/08/2010

Beginning Balance	Total Charges	Total Payments	Current Balance
81.18	3004.18	3027.02	104.02

===== TRANSACTIONS =====

Date	Batch	Description	Ref Doc	Amount	Balance
06/04/2009	SI0460769-076	099-COMM SPL		20.25DB	579.27
06/04/2009	SI0460769-077	099-COMM SPL		22.92DB	556.35
06/04/2009	II0460773-030	072-METER MAIL	74009	0.54DB	555.81
06/11/2009	SI0461675-099	099-COMM SPL		22.39DB	533.42
06/11/2009	SI0461675-100	099-COMM SPL		13.60DB	519.82
06/17/2009	II0462177-012	072-METER MAIL	18386	2.07DB	517.75
06/18/2009	SI0462297-092	099-COMM SPL		27.82DB	489.93
06/18/2009	SI0462297-093	099-COMM SPL		3.40DB	486.53
06/19/2009	SI0462489-004	070-PHOTO COPY	16654	9.60DB	476.93
06/19/2009	SI0462489-009	070-PHOTO COPY	18385	5.10DB	471.83
06/25/2009	SI0463056-084	099-COMM SPL		39.78DB	432.05
06/25/2009	SI0463056-085	099-COMM SPL		13.60DB	418.45
06/29/2009	II0463299-060	072-METER MAIL	81124	1.05DB	417.40
07/02/2009	SI0463744-070	099-COMM SPL		13.26DB	404.14
07/02/2009	SI0463744-071	099-COMM SPL		13.60DB	390.54
07/07/2009	SI0464393-007	070-PHOTO COPY	81147	0.20DB	390.34
07/07/2009	SI0464393-028	070-PHOTO COPY	81123	0.10DB	390.24
07/09/2009	SI0464651-089	099-COMM SPL		36.84DB	353.40
07/16/2009	SI0465453-004	070-PHOTO COPY	81199	0.30DB	353.10
07/16/2009	SI0465467-097	099-COMM SPL		26.93DB	326.17
07/16/2009	SI0465467-098	099-COMM SPL		17.00DB	309.17
07/22/2009	HQ0465994-014	061-CK INMATE	77494	24.00DB	285.17
07/23/2009	SI0466075-080	099-COMM SPL		13.60DB	271.57
07/23/2009	SI0466075-081	099-COMM SPL		29.04DB	242.53
07/24/2009	II0466260-014	072-METER MAIL	81222	3.12DB	239.41
07/28/2009	II0466637-034	072-METER MAIL	81247	2.58DB	236.83
07/30/2009	SI0466820-062	099-COMM SPL		35.29DB	201.54
08/06/2009	SI0467784-090	099-COMM SPL		19.82DB	181.72
08/06/2009	SI0467784-091	099-COMM SPL		10.20DB	171.52
08/07/2009	II0468086-043	072-METER MAIL	81285	1.56DB	169.96
08/10/2009	HQ0468139-006	011-RCPT MO/CC MAIL		200.00	369.96
08/12/2009	SI0468472-003	070-PHOTO COPY	81281	2.50DB	367.46
08/12/2009	SI0468472-029	070-PHOTO COPY	81244	1.20DB	366.26
08/12/2009	SI0468472-033	070-PHOTO COPY	81249	7.05DB	359.21
08/12/2009	SI0468472-036	070-PHOTO COPY	81215	0.40DB	358.81
08/12/2009	SI0468472-043	070-PHOTO COPY	81224	4.80DB	354.01
08/13/2009	SI0468627-089	099-COMM SPL		10.20DB	343.81
08/13/2009	SI0468627-090	099-COMM SPL		28.09DB	315.72
08/19/2009	II0469128-037	072-METER MAIL	81361	1.39DB	314.33

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= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 03/08/2010 =

Doc No: 32935 Name: MCCORMACK, ROBERT J
Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL
TIER-A CELL-1

Transaction Dates: 03/08/2009-03/08/2010

Beginning Balance	Total Charges	Total Payments	Current Balance
81.18	3004.18	3027.02	104.02

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
08/20/2009	SI0469202-065	099-COMM SPL		18.81DB	295.52
08/20/2009	SI0469202-066	099-COMM SPL		13.60DB	281.92
08/27/2009	SI0469845-064	099-COMM SPL		10.20DB	271.72
08/27/2009	SI0469845-065	099-COMM SPL		16.32DB	255.40
08/28/2009	HQ0469982-003	070-PHOTO COPY	81403	0.10DB	255.30
08/28/2009	HQ0469982-005	070-PHOTO COPY	81347	0.10DB	255.20
08/28/2009	HQ0469982-018	070-PHOTO COPY	81362	2.10DB	253.10
08/28/2009	SI0470036-056	071-MED CO-PAY	300487	3.00DB	250.10
08/31/2009	SI0470140-007	071-MED CO-PAY	297061	3.00DB	247.10
08/31/2009	SI0470140-076	071-MED CO-PAY	305069	3.00DB	244.10
09/02/2009	II0470457-024	072-METER MAIL	81475	1.39DB	242.71
09/02/2009	II0470457-025	072-METER MAIL	81461	1.39DB	241.32
09/03/2009	SI0470657-080	099-COMM SPL		15.64DB	225.68
09/03/2009	SI0470657-081	099-COMM SPL		3.40DB	222.28
09/10/2009	SI0471607-095	099-COMM SPL		13.60DB	208.68
09/10/2009	SI0471607-096	099-COMM SPL		20.45DB	188.23
09/11/2009	II0471773-019	072-METER MAIL	18205	1.39DB	186.84
09/17/2009	SI0472364-081	099-COMM SPL		27.66DB	159.18
09/22/2009	II0472847-034	072-METER MAIL	18259	4.17DB	155.01
09/24/2009	SI0473062-073	099-COMM SPL		18.97DB	136.04
09/24/2009	SI0473062-074	099-COMM SPL		10.20DB	125.84
09/30/2009	II0473668-045	072-METER MAIL	81817	2.75DB	123.09
09/30/2009	II0473699-003	072-METER MAIL	81824	3.46DB	119.63
10/01/2009	II0473737-007	072-METER MAIL	81261	1.05DB	118.58
10/01/2009	SI0473747-072	099-COMM SPL		17.39DB	101.19
10/01/2009	SI0473747-073	099-COMM SPL		10.20DB	90.99
10/01/2009	SI0473923-005	100-CR INM CMM		0.06	91.05
10/02/2009	HQ0473943-004	011-RCPT MO/CC	MAIL	100.00	191.05
10/02/2009	SI0474045-008	070-PHOTO COPY	18240	1.10DB	189.95
10/02/2009	SI0474045-010	070-PHOTO COPY	81486	0.50DB	189.45
10/02/2009	SI0474045-012	070-PHOTO COPY	81460	1.60DB	187.85
10/02/2009	SI0474045-018	070-PHOTO COPY	81476	1.60DB	186.25
10/02/2009	SI0474045-027	070-PHOTO COPY	18204	1.70DB	184.55
10/05/2009	SI0474174-009	070-PHOTO COPY	81825	6.40DB	178.15
10/05/2009	SI0474174-018	070-PHOTO COPY	81820	6.70DB	171.45
10/05/2009	SI0474174-024	070-PHOTO COPY	18258	6.30DB	165.15
10/05/2009	SI0474183-046	071-MED CO-PAY	304561	5.00DB	160.15
10/08/2009	SI0474874-084	099-COMM SPL		23.54DB	136.61
10/08/2009	SI0474874-085	099-COMM SPL		16.35DB	120.26

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= IDOC TRUST ===== OFFENDER BANK BALANCES ===== 03/08/2010 =

Doc No: 32935 Name: MCCORMACK, ROBERT J
Account: CHK Status: ACTIVE

SICI/NORTH PRES FACIL
TIER-A CELL-1

Transaction Dates: 03/08/2009-03/08/2010

Beginning Balance	Total Charges	Total Payments	Current Balance
81.18	3004.18	3027.02	104.02

===== TRANSACTIONS =====					
Date	Batch	Description	Ref Doc	Amount	Balance
10/15/2009	SI0475499-077	099-COMM SPL		15.52DB	104.74
10/15/2009	SI0475499-078	099-COMM SPL		3.40DB	101.34
10/21/2009	II0476142-003	072-METER MAIL	78427	9.90DB	91.44
10/26/2009	HQ0476596-015	061-CK INMATE	78429	83.93DB	7.51
10/27/2009	HQ0476722-020	011-RCPT MO/CC	RCPT MO	100.00	107.51
11/02/2009	SI0477384-057	099-COMM SPL		10.20DB	97.31
11/02/2009	SI0477384-058	099-COMM SPL		32.40DB	64.91
11/05/2009	SI0477894-064	099-COMM SPL		37.41DB	27.50
11/05/2009	SI0477894-065	099-COMM SPL		10.20DB	17.30
11/05/2009	SI0477952-012	070-PHOTO COPY	78428	6.55DB	10.75
11/05/2009	SI0477952-024	070-PHOTO COPY	78486	0.50DB	10.25
11/05/2009	SI0477952-027	070-PHOTO COPY	78458	0.40DB	9.85
11/05/2009	SI0477952-031	070-PHOTO COPY	78440	0.20DB	9.65
11/05/2009	SI0478104-141	071-MED CO-PAY	326142	5.00DB	4.65
11/12/2009	SI0478807-082	099-COMM SPL		4.54DB	0.11
11/13/2009	II0479000-030	072-METER MAIL	81934	5.19DB	5.08DB
11/16/2009	II0479153-050	072-METER MAIL	81956	1.77DB	6.85DB
11/17/2009	II0479278-046	072-METER MAIL	81935	2.95DB	9.80DB
11/27/2009	II0480238-034	072-METER MAIL	82901	0.88DB	10.68DB
11/27/2009	II0480258-002	072-METER MAIL	82779	2.03DB	12.71DB
12/02/2009	II0480716-039	072-METER MAIL	82830	2.24DB	14.95DB
12/02/2009	II0480716-050	072-METER MAIL	82800	1.05DB	16.00DB
12/04/2009	HQ0481020-005	011-RCPT MO/CC	MAIL	150.00	134.00
12/10/2009	SI0482044-081	099-COMM SPL		10.20DB	123.80
12/10/2009	SI0482044-082	099-COMM SPL		42.98DB	80.82
12/14/2009	II0482374-129	072-METER MAIL	82864	1.83DB	78.99
12/15/2009	SI0482518-001	070-PHOTO COPY	82829	0.25DB	78.74
12/15/2009	SI0482518-004	070-PHOTO COPY	82844	0.90DB	77.84
12/15/2009	SI0482518-017	070-PHOTO COPY	82801	1.20DB	76.64
12/15/2009	SI0482525-006	070-PHOTO COPY	82900	1.10DB	75.54
12/15/2009	SI0482525-010	070-PHOTO COPY	82780	1.80DB	73.74
12/15/2009	SI0482525-026	070-PHOTO COPY	81970	4.55DB	69.19
12/15/2009	SI0482547-008	070-PHOTO COPY	81957	0.10DB	69.09
12/15/2009	SI0482547-009	070-PHOTO COPY	81938	10.90DB	58.19
12/15/2009	SI0482547-021	070-PHOTO COPY	81921	0.30DB	57.89
12/15/2009	SI0482547-025	070-PHOTO COPY	81910	0.60DB	57.29
12/16/2009	SI0482771-003	071-MED CO-PAY	338995	3.00DB	54.29
12/17/2009	SI0482812-013	071-MED CO-PAY	338951	5.00DB	49.29
12/17/2009	SI0482818-073	099-COMM SPL		10.20DB	39.09

NOTICE OF APPEAL

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2010 MAR 23 PM 1 54

RICHARD WHITEHEAD ISB #2851

WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C. CLERK OF THE DIST. COURT

2230 3rd Avenue North

Post Office Box 607

Lewiston, ID 83501

Telephone: (208) 743-5299

Facsimile: (208) 743-7432

PATTY O. WEEKS

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT JAMES MCCORMACK,)

Plaintiff,)

vs.)

CHRISTOPHER E. CALDWELL and)
WHITEHEAD, AMBERSON &)
CALDWELL, PLLC,)

Defendant)

CASE NO. CV2009-1218

REQUEST FOR ADDITIONAL
RECORD

TO: ROBERT JAMES MCCORMACK AND THE CLERK

NOTICE IS HEREBY GIVEN, that the Respondent in the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the notice of appeal:

1. Clerks Record;

a. Motion to Dismiss Pursuant to IRCP Rule 12(b)(6).

REQUEST FOR ADDITIONAL RECORD

1

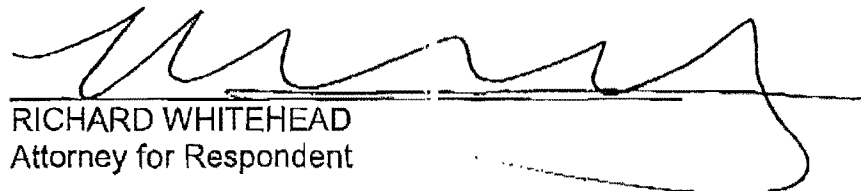
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- b. Memorandum in Support of Motion to Dismiss Pursuant to IRCP Rule 12(b)(6).
- c. Affidavit of Christopher Caldwell in Support of Defendants' Motion to Dismiss Pursuant to IRCP Rule 12(b)(6).
- d. Affidavit of Ronda K. Nichols in Support of Defendants' Motion to Dismiss Pursuant to IRCP Rule 12(b)(6).
- e. Notice of Hearing.
- f. Motion to Strike Supplemental Affidavit of Motion to Reconsider;
- g. Memorandum in Opposition to Plaintiff's Motion to Reconsider;
- h. Motion to Strike Plaintiff's Motion to Reconsider, Further Information, Request for Oral Argument.

3. I certify that a copy of this request was served upon the clerk of the district court or administrative agency and upon all parties required to be served pursuant to Rule 20.

DATED this 23 day of March, 2010.

WHITEHEAD, AMBERSON & CALDWELL, P.L.L.C.



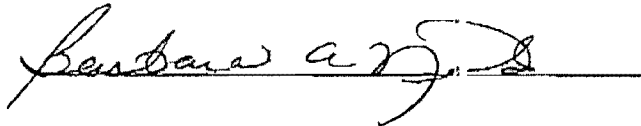
RICHARD WHITEHEAD
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on this 23 day of March, 2010, I caused
to be served a true and correct copy of the foregoing via U.S. Mail, postage pre-
paid, to the following:

Robert James McCormack
South Idaho Correctional Institution
PO Box 8509 N.D.A.-29
Boise, ID 83707

Patty Weeks
Clerk of the District Court, Nez Perce County
PO Box 896
Lewiston, Idaho 83501



FILED

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PATTY D. WEEKS
CLERK OF THE DIST. COURT

Jerry Anderson
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,

Plaintiff,

v.

CHRISTOPHER E. CALDWELL and
WHITEHEAD, AMBERSON &
CALDWELL, PLLC,

Defendants.

CASE NO. CV 09-001218

MEMORANDUM OPINION AND
ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL
PAYMENT OF COURT FEES
AND MOTION FOR
APPOINTMENT OF COUNSEL

This matter came before the Court on the Plaintiff's Motion for Partial Payment of Court Fees. The Plaintiff proceeded *pro se* in the matter. The Defendant was represented by Thomas Amberson, of the firm Whitehead, Amberson & Caldwell. The Court heard oral argument telephonically on this matter on April 13, 2010. The Court, having heard the argument of counsel and being fully advised in the matter, hereby renders its decision.

BACKGROUND

Currently pending in the action before this Court are the Plaintiff's Motion for Partial Payment of Court Fees and Motion for Appointment of Counsel. Plaintiff initiated this civil action while incarcerated in prison. Most recently, the Plaintiff has filed a Notice of Appeal, filed with the Court on March 11, 2010. Due to his current incarceration, the Plaintiff argues he cannot afford the payment of court fees for purposes of pursuing his appeal of this Court's previous ruling which granted the Defendants' motion to dismiss the case. Further, the Plaintiff is seeking the appointment of counsel on the basis that the issues to be presented on appeal may become too complex for the Plaintiff to properly pursue, coupled with the argument that the Plaintiff lacks the knowledge and skills needed to represent himself.

The Defendant has objected to the Plaintiff's motion seeking partial payment of court fees. The Defendant argues the Plaintiff has received funds while incarcerated of an amount sufficient to pay any court fees necessary in the case at hand. The Defendant makes no argument regarding the Plaintiff's request for appointment of counsel. This issue will be addressed, however, for purposes of expediting the appeal in this matter.

ANALYSIS

1. Partial payment of court fees

Plaintiff McCormack asks this Court to grant his motion allowing him to partially pay court fees in order to proceed with his appeal of this Court's previous order granting the Defendant's motion to dismiss. The motion is made pursuant to I.C. § 31-3220A, which allows for partial payment of court fees in civil actions, where a party to the action is a prisoner. The intent of the Idaho Legislature in enacting this statute is to create a

disincentive for the filing of frivolous claims by inmates and to assure the financial accountability of prisoners. *See Madison v. Craven*, 141 Idaho 45, 105 P.3d 705 (Ct. App. 2005).

Idaho Code Section 31-3220A describes the procedures to be followed when prisoners seek to file certain types of civil actions with partial payment of court fees. Under this statute, an action includes any civil suit or proceeding including appeals from those suits and habeas corpus petitions. A prisoner who seeks to file an action with partial payment of court fees must file a motion to proceed on partial payment and an affidavit containing information demonstrating the prisoner's inability to pay all court fees at the time of filing the action. I.C. § 31-3220A(2)(a) and (b). In addition to the motion and affidavit, the prisoner must also submit a certified copy of his or her inmate account that reflects the activity of the account over the period of incarceration or for twelve months, whichever is less. I.C. § 31-3220A(2)(c). After reviewing the information provided and considering the prisoner's ability to pay all court fees at the time of filing the action, the district court must order the prisoner to pay all or part of the court fees. I.C. § 31-3220A(3). The statute includes a safety-valve provision, which provides that in no event shall a prisoner be prohibited from bringing an action for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee. I.C. § 31-3220A(7).

Id. at 47, 105 P.3d at 707.¹

This Court is required to consider the prisoner's ability to pay all court fees at the

¹ I.C. § 31-3220A states in relevant part:

(3) Upon review of the information provided and considering the prisoner's ability to pay all court fees at the time of filing the action, the court shall order the prisoner to pay all or part of the court fees as set forth in sections 31-3201 and 31-3201A, Idaho Code.

(4) If the court permits the prisoner's action to proceed on partial payment of court fees, the court shall assess and, when funds exist, collect a partial payment of any court fees as set forth in sections 31-3201 and 31-3201A, Idaho Code, an initial partial filing fee of twenty percent (20%) of the greater of:

- (a) The average monthly deposits to the prisoner's inmate account; or
- (b) The average monthly balance for the six (6) month period immediately preceding the filing of the action.

(5) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of twenty percent (20%) of the preceding month's income credited to the prisoner's inmate account until the full amount of all applicable court fees set forth in sections 31-3201 and 31-3201A, Idaho Code, are paid. The agency or entity having custody of the prisoner shall forward payments from the prisoner's inmate account to the clerk of the court each time the amount in the prisoner's inmate account exceeds ten

time of the filing of the action. At the time the Plaintiff filed the Notice of Appeal in this case on March 11, 2010, the balance of his inmate account was \$104.02; an amount sufficient to pay for the filing fees of the Notice of Appeal.² The Court notes that another affidavit containing the Plaintiff's inmate account records was filed on March 25, 2010, and at that time the balance of the Plaintiff's account was \$53.07. While the Plaintiff claims to have insufficient funds for purposes of filing an appeal, it is evident from a review of Plaintiff's inmate account that he receives funds regularly via mail that are deposited into his inmate account.³

The Defendant has objected to the Plaintiff's motion on the basis that the Plaintiff had received \$7, 509.55 on March 14, 2008. *See Defendants' Objection to Plaintiff's Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner)*, at 2. This deposit to the Plaintiff's inmate account occurred outside the one year time frame contemplated by I.C. § 31-3220A(2)(c). Further, it is unnecessary for this Court to consider amounts that Plaintiff has deposited in the past, when the balance

dollars (\$10.00) until the full amount of all applicable court fees set forth in sections 31-3201 and 31-3201A, Idaho Code, are paid.

² Appendix A, of the Idaho Rules of Civil Procedure sets forth the total cost for filing fees for a Civil Appeal to the Supreme Court as \$101.00 (\$86.00 for the Supreme Court fee, \$9.00 for the County District Court Fund, and \$6.00 for the Senior Magistrate Judges Fund).

³ Cash deposits were made to the Plaintiff's inmate accounts as follows:

- 4/20/2009 1939.00
- 5/11/2009 10.60
- 5/26/2009 116.60
- 8/10/2009 200.00
- 10/02/2009 100.00
- 10/27/2009 100.00
- 12/04/2009 150.00
- 1/12/2010 100.00
- 2/01/2010 100.00
- 2/22/2010 10.76
- 3/08/2010 100.00

of the Plaintiff's account was sufficient for purposes of filing fees at the time the Notice of Appeal was filed.

An inmate's constitutional right of access to the courts is not an absolute or unconditional right in the civil context.

Inmates have a constitutional right of access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *Drennon v. Hales*, 138 Idaho 850, 853, 70 P.3d 688, 691 (Ct.App.2003). That access must be adequate, effective, and meaningful. *Bounds*, 430 U.S. at 822, 97 S.Ct. at 1495, 52 L.Ed.2d at 79. This right, however, is not absolute or unconditional in the civil context, except in a very narrow group of cases where the inmate has a fundamental interest at stake. *Taylor*, 281 F.3d at 848. The United States Supreme Court has recognized only two such fundamental interests that require state courts to completely waive filing fees for indigent persons-those challenging termination of their parental rights or those seeking a divorce. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

Madison, 141 Idaho at 48, 105 P.3d at 708. In addition to the determination that the Plaintiff had sufficient funds in his inmate account to pay for the filing fees when the Notice of Appeal was filed, it is also important to note the case at hand is not within the narrow group of cases where an inmate has a fundamental interest at stake, as discussed in *Madison*. Based upon a review of the Plaintiff's inmate account, as required by I.C. § 31-3220A, the Plaintiff's Motion for Partial Payment of Court Fees is denied.

2. Appointment of counsel

The Plaintiff is also seeking appointment of counsel to represent him for purposes of appeal. The Plaintiff filed a Motion and Affidavit in Support for Appointment of Counsel similar to those filed for appointment of counsel in criminal cases. A comparable motion was made previously in this case, at which time the Court denied the Plaintiff's motion. *See Order Denying Motion for Appointment of Counsel*, filed

November 23, 2009. The Plaintiff's motion for appointment of counsel was not argued before the Court at the hearing on this matter; however, it will be addressed at this time for purposes of moving forward with the Plaintiff's appeal in this case.

The Plaintiff is not entitled to the appointment of counsel for purposes of pursuing a civil action against his former counsel. There is a rebuttable presumption that a claimant in a civil action is not entitled to appointed counsel.

[T]here is no general rule that due process requires the appointment of counsel in civil cases where the personal liberty of an individual is not at stake. *Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27, 101 S.Ct. 2153, 2159-60, 68 L.Ed.2d 640, 649 (1981). Rather, in cases where personal liberty is not threatened, there exists a rebuttable presumption that the claimant is not entitled to appointed counsel. *Id.* This presumption may be overcome by application of the balancing test enunciated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), which requires consideration of (a) the private interests at stake, (b) the government's interest, and (c) the risk that the procedures used, with the claimant having no counsel, will lead to an erroneous decision. *Id.*; *Lassiter*, 452 U.S. at 27, 101 S.Ct. at 2159.

State, Dept. of Law Enforcement By and Through Cade v. One 1990 Geo Metro, VIN 2C1MR2464L6012694, 126 Idaho 675, 683, 889 P.2d 109, 117 (Ct. App. 1995); *see also Murray v. Spalding*, 141 Idaho 99, 106 P.3d 425 (2005)(inmate had no constitutional or statutory right to appointed counsel in his civil rights action against prison officials). The case at hand is not one where the Plaintiff's personal liberty is threatened, nor does the court record support a determination that Plaintiff is entitled to counsel. Therefore, the Plaintiff's motion for appointment of counsel is denied.


ORDER

The Plaintiff's Motion for Partial Payment of Court Fees is hereby DENIED.

Further, it is ordered that the Plaintiff's Motion for Appointment of Counsel is hereby DENIED.

IT IS SO ORDERED.

Dated this 26th day of May 2010.



CARL B. KERRICK – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL PAYMENT OF COURT FEES AND MOTION FOR APPOINTMENT OF COUNSEL was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 21st day of May, 2010, on:

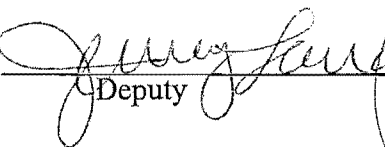
Robert James McCormack
South Idaho Correctional Institution
P O Box 8509 N.D. A-29
Boise ID 83707

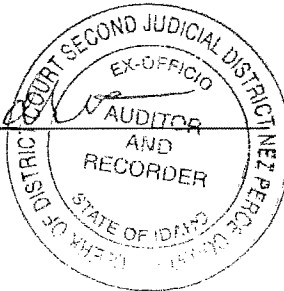
Carolyn Puckett
South Idaho Correctional Institution
P O Box 8509 N.D. A-29
Boise ID 83707

Richard Whitehead
WHITEHEAD AMBERSON & CALDWELL
P O Box 607
Lewiston ID 83501

PATTY O. WEEKS, CLERK

By:


Deputy



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,)	
)	
Plaintiff-Appellant,)	
)	
	)	SUPREME COURT NO. 37494-2010
)	
)	
v.	)	CLERK'S CERTIFICATE
)	
CHRISTOPHER E. CALDWELL)	
WHITEHEAD, AMBERSON &)	
CALDWELL, PLLC,)	
)	
Defendants-Respondents.)	

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that the foregoing Clerk's Record in the above-entitled cause was compiled and bound by me and contains true and correct copies of all pleadings, documents, and papers designated to be included under Rule 28, Idaho Appellate Rules, the Notice of Appeal, any Notice of Cross-Appeal, and additional documents that were requested.

I further certify:

1. That no exhibits were marked for identification or admitted into evidence during the course of this action.

CLERK'S CERTIFICATE

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

ROBERT J. McCORMACK,)
)
Plaintiff-Appellant,)
)
) SUPREME COURT NO. 37494-2010
)
)
v.) CERTIFICATE OF SERVICE
)
CHRISTOPHER E. CALDWELL)
WHITEHEAD, AMBERSON &)
CALDWELL, PLLC,)
)
Defendants-Respondents.)

I, DeAnna P. Grimm, Deputy Clerk of the District Court of
the Second Judicial District of the State of Idaho, in and for
the County of Nez Perce, do hereby certify that copies of the
Clerk's Record and Reporter's Transcript were placed in the
United States mail and addressed to Robert J. McCormack, IDOC
#32935, SICI - ND - A29, P O Box 8509, Boise, ID 83707 and hand *mailed*
~~delivered~~ to Richard Whitehead, P O Box 607, Lewiston, ID 83501,
this 4 day of ~~August~~ *Oct* 2010.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed
the seal of the said Court this 4 day of ~~August~~ *Oct* 2010.

PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

By DEANNA P. GRIMM
Deputy Clerk